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Citation: 35 Brook. J. Int'l L. 155 2010

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IN SEARCH OF ALTERNATIVE SOLUTIONS: CAN THE STATE OF ORIGIN BE HELD INTERNATIONALLY RESPONSIBLE FOR INVESTORS' HUMAN RIGHTS ABUSES THAT ARE NOT ATTRIBUTABLE TO IT?

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INTRODUCTION	157
I. FRAMING THE ISSUE	160
<i>A. The Asymmetries of Public International Law and the Need for Surrogate Solutions</i>	160
<i>B. Presumptions and Simplifications: The Gordian Knot of Nationality</i>	168
<i>C. Delimiting the Article's Focus: Excluding "Direct" Attribution and Complicity</i>	170
II. State Responsibility Under the Due Diligence Principle	175
<i>A. The Origins of the Due Diligence Standard and Its Twofold Nature</i>	177
<i>B. The Positive Effect of Human Rights under the Due Diligence Standard</i>	180
1. Civil Rights	182
2. Social Rights	188
<i>C. Limits on the Primary Obligations of the "Home" State</i>	197
1. Limits Inherent to the Due Diligence Principle	197
2. Limits Inherent to the "Protected Right"	199
3. Balancing Human Rights with the (Human) Rights of the Investor	204

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III. TAKING DUE DILIGENCE BEYOND TERRITORIALITY	207
<i>A. Bases of Jurisdiction</i>	208
1. Universal Jurisdiction	208
2. Active Personality Jurisdiction	216
<i>B. The Question of Extraterritoriality Revisited: Beyond the Criterion of Effectiveness in the Exercised Control</i>	218
1. Extraterritorial Obligations and Direct Attribution.....	219
2. Extraterritorial Obligations under Due Diligence	223
CONCLUSION	229

INTRODUCTION

The road to hell is said to be paved with good intentions, and while there is no reason to question the intentions of international investors, there is good reason to question the activities of the international firms they invest in, as these firms have a significant impact on the states and communities in which they operate. While the impact of international investor firms can be beneficial—such corporations do, for instance, contribute to social and economic development—international businesses can also conduct their activities with detrimental disregard for the environment and human rights. Indeed, the idea that global businesses harm local populations around the world is far from fiction. Even if extreme or systematic violations of “fundamental” human rights are not the rule, “minor,” everyday infractions are frequent and multitudinous. Private economic actors have an influential international role and in fact, some of their actions—had they been state actions instead—would potentially amount to wrongful international conduct.

The answers provided by international law to this relatively new reality are far from sufficient. The investor is recognized as a *passive* subject of international law whose rights are guaranteed by interstate bilateral investment treaties (“BIT”), preferential trade agreements, and other regional and multilateral instruments.¹ At the same time, states recognize the international investor as an “equal,” *active* subject, with whom they sign “state investment contracts” that create reciprocal obligations for both parties. The objectives of these investment contracts are clear—the investor pursues profit and the host state pursues economic development.² It is true that the so-called globalization phenomenon arrived in the spirit of liberalization to facilitate and expand international investment practices; however, the normative landscape has remained largely

1. See David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 LAW & SOC. INQUIRY 757, 767–773 (2000) (discussing the rise of a network of bilateral, regional, and multilateral agreements pursued by states to protect private investors’ rights abroad).

2. The Preamble to the International Center for Settlement of Investment Disputes Convention on the Settlement of Investment Disputes between States and Nationals of Other States begins: “Considering the need for international cooperation for economic development, and the role of private international investment therein.” Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, pmbl., *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]; see also Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/RES/41/128 (Dec. 4, 1986) (in regards to the right to development as a human right, Article 1 states that “every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”).

intersubjective, highly fragmented, and underinstitutionalized. A complete set of general international norms is lacking and the various arbitral tribunals³ that continue to operate without centralized, organic, and systemic links are forced to vacillate between the private will of the particular contracting parties and general international law.⁴ In other words, although the investor is often elevated to the level of an international subject with the above-mentioned capacities, the international legal order remains silent as to the general obligations of that investor—particularly with respect to the universal values that make up the international public order.

Given this asymmetry, this Article will examine the question of whether there is room for classic state responsibility to be applied when investors violate international human rights norms in the course of their activities within their host states. The circle of subjects that could be—according to various legal bases—held accountable, however, extends beyond mere investors. International investment is a game of at least three players—the host state, the investor, and the investor's home state.⁵

3. Although a large portion of arbitral tribunals are instituted within the framework of the International Center for the Settlement of Investment Disputes (ICSID), there are many others instituted *ad hoc* (mostly following the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules).

4. See Charles Leben, *La théorie du contrat de'état et l'évolution du droit international des investissements*, 302 RECUEIL DES COURS 197, 220 (2003); see also ICSID Convention, *supra* note 2, at art. 42(1). The ICSID Convention provides:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

Id. Concerning the applicability of the human rights international norms, see Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY., ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 678, 678–707 (Christina Binder et. al., eds., 2009) (discussing how, by the means of Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties, investment tribunal may introduce human rights into judicial reasoning).

5. Two other “players” are also involved in this “game”: individuals (members of the local population which is directly affected by the consequences of the behavior of the three main “players”) and the international community as a whole (which can be indirectly affected when the behavior of the three main “players” amounts to a violation of *erga omnes* norms of international law). See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 508 (2001) (describing the relationship between the investor corporations and affected individuals as “ties . . . falling within concentric circles emanating from the enterprise, with spheres enlarging from

With respect to international law, the responsibility of the host state in which the violation occurs is self-evident.⁶ In similar terms, as far as the home state is concerned, while exercising its territorial jurisdiction, it is expected to regulate and control investment activities in a way that will effectively guarantee respect for all universally recognized human rights. However, the international responsibility of the second player—the investor—is in *status nascendi*, or, underdeveloped. This very gap (or, *lacuna*) calls for the exploration of alternative legal pathways. Accordingly, the object of this Article is to focus on classic state responsibility as the basis for the argument that, next to the host state, the home state may also be held internationally responsible for the conduct of an investor violating internationally protected human rights.⁷

To validate this argument in terms of positive law, this Article proposes a legal framework *de lege ferenda* (i.e., legal framework of “what the law ought to be”) and outlines its limitations and conditions of application. The idea is simple. In terms of international law, for a state to be deemed internationally responsible, it must have breached, by act or

employees to their families, to the citizens of a given locality otherwise affected by their operation (admittedly a broad and amorphous category), and eventually to an entire country.”). Special attention should also be paid to the role of international organizations, particularly to the role of the World Bank and the International Monetary Fund, whose impact in promoting (mainly through conditionality) international standards is quite often bigger than that of the states. See, e.g., Manisuli Ssenyonjo, *Non-State Actors and Economic, Social, and Cultural Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ACTION 109, 118–33 (Mashood A. Baderin & Robert McCrosuodale eds., 2007).

6. See *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 351–52 (stating that “from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial” and “as a general rule, defined and limited by the sovereign territorial rights of the other relevant States”).

7. Only few scholars have so far written in support of this argument. See Francesco Francioni, *Exporting Environmental Hazard through Multinational Enterprises: Can the State of Origin be Held Responsible?*, in INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM 275 (Francesco Francioni & Tullio Scovazzi eds., 1991) (arguing that the home state may be held responsible for the activities of the investor for pollution of the environment); Francesco Francioni, *Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations*, in ECONOMIC GLOBALISATION AND HUMAN RIGHTS 245 (Wolfgang Benedek, Koen de Feyter & Fabrizio Marrella eds., 2007) (arguing that the home state may be held responsible for the activities of the investor for violations of human rights); Robert McCorquodale, *Spreading Weeds Beyond Their Garden: Extraterritorial Responsibility of States for Violations of Human Rights by Corporate Nationals*, 100 AM. SOC'Y INT'L L. PROC. 95 (2006); Robert McCorquodale & Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, 70 MOD. L. REV. 598, 600–01, 615–623 (2007). Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 B.C. INT'L & COMP. L. REV. 273, 305–307 (2002).

omission, one of its international obligations. Accordingly, to hold the home state responsible for conduct of its own investors acting outside its territory—i.e., conduct in principle not attributable to it—the home state must be bound by an autonomous international obligation, the breach of which is deemed an internationally wrongful act. Part I of this Article will clarify and delimit certain aspects of this discussion and the bases of its significance. In Part II, this Article introduces the generic international obligation of due diligence, which requires that every state should, to the best of its respective ability, fight breaches of international law by implementing deterrent or retributive punishment measures. Part II will also examine more closely the scope of the due diligence obligation and its effect with regard to international human rights, highlighting its benefits as well as necessary limits on its imposition. Part III will then link the due diligence obligation to the home state's duty to deter investors from, or punish investors for, committing human rights violations outside its territory, implying that a state's failure to do so implicates international liability on the part of that state. To facilitate this framework, two types of jurisdictional basis are proposed: universal jurisdiction and active personality. While the first basis falls under the absolute discretion of state authorities, the latter, if seen from the perspective of extraterritoriality, turns into an international obligation for the state of origin.

I. FRAMING THE ISSUE

A. The Asymmetries of Public International Law and the Need for Surrogate Solutions

Since the “mainstream” solutions provided by public international law have been inadequate thus far, the “surrogate” solutions proposed in this article are promising, if not necessary, in the face of ongoing investor human rights violations. The scenario is well-understood. While international investors callously perpetrate violations, they remain immune to retribution from their host states because the governmental bodies of those states are either corrupt or blinded by the economic growth the corporations stand to stimulate.⁸ This picture of inefficiency is replete

8. See, e.g., Chimugwuanya Nwobike & Richard Aduche Wokocha, *Privileging Investor Rights over Public Interest in Investment Agreements - The Human Rights Implications of the Chad/Cameroon Conventions of Establishment*, 10 RECHT IN AFRIKA 95 (2007) (Ger.) (detailing the contracts of establishment signed between Chad and Cameroon on one side, and a consortium of oil companies on the other which contained burdensome clauses that were voluntarily endorsed by local governments and might in fact undermine those governments' ability to guarantee the respect of human rights); see also Kenneth F. McCallion, *Institutional and Procedural Aspect of Mass Claims Litigation*

given the absence of a mature and effective legal body for holding the investor directly accountable at the international level. Thus, the situation calls for more imaginative ideas.

The international legal order has always been imperfect. The transition from *jus gentium* to the Vattel model of *jus inter gentes* deprived the individual of legal consideration at the international level for quite some time. It was only after the Second World War that the need to move toward a "modern" international legal regime emerged.⁹ And it was then that universal human rights norms emerged and established the "individual" as a passive subject who holds rights and owes duties that emanate directly from the international legal order.¹⁰

However, modernity did not disown each and every characteristic of "classicism" within international law. With modernity, the focus remained on states; sovereign domestic governments continued to assert exclusive competence and authority to determine the extent of the international legal capacity of the other international subjects, including private entities.¹¹ The attributes of that legal capacity with respect to natural persons (e.g., citizens, minority citizens, terrorists, rebels or members of a liberation group) as well as legal persons (e.g., non-governmental organizations, multinational corporations, or trade unions) varied according to sovereign state's will.¹² At the international level, the private actor was only assigned legal rights or duties to the extent that states consented.¹³ This is the "voluntarist" narrative of international law.¹⁴

The "objectivist" perspective, on the other hand, marginalizes the role of states in determining the legal rights and duties of private actors by

and Settlement: The Exxon Valdez and Bhopal Gas Disaster Cases, in INSTITUTIONAL AND PROCEDURAL ASPECTS OF MASS CLAIMS SETTLEMENT SYSTEMS: PAPERS EMANATING FROM THE PCA INTERNATIONAL LAW SEMINAR ON DECEMBER 9, 1999, at 43, 52–57 (The International Bureau of the Permanent Court of Arbitration ed., 2000) (detailing the failure of the judiciary of India to provide effective judicial protection in the case of the thousands of victims of the Bhopal accident); Erik J. Woodhouse, Note, *The "Guerra Del Agua" and the Cochabamba Concession: Social Risk and Foreign Direct Investment in Public Infrastructure*, 39 STAN. J. INT'L L. 295 (2003).

9. SHABTAI ROSENNE, THE PERPLEXITIES OF MODERN INTERNATIONAL LAW 15–16 (2004).

10. See, e.g., JOE VERHOEVEN, DROIT INTERNATIONAL PUBLIC 295–312 (2000).

11. See ROSENNE, *supra* note 9, at 15–16.

12. *Id.*

13. *Id.* at 15–17.

14. Emmanuelle Juannet, *A Century of French International Law Scholarship*, 61 ME. L. REV. 83, 94 (2009). "The positivism of this period generally expresses a fairly simple, voluntarist conception of law: international law is a product of state consent, which is the foundation of the law it produces." *Id.*

placing emphasis on international social *necessity*.¹⁵ The International Court of Justice ("ICJ") has outlined in case law a system of "variable geometry" stressing that the nature of international legal personality depends upon the collective needs of the international community.¹⁶ Still, despite the emergence of the objectivist perspective, there remains a glaring asymmetry. The *lacunae* of the international system are the result of its very nature and its transition towards a multilayered society.¹⁷ Thus, while the individual investor is a "giant" international actor, the legal obligations and responsibilities attributed to him or her are those of a "pygmy." Indeed, when it comes to individual actors, international law only provides for hybrid criminalization of certain serious transgressions.

Of course, it is true that the problem of investor human rights violations is relatively new; the private economic actor was never as rambunctious in the past. But efforts at the international level to prevent corporations from abusing human rights did not begin with globalization as they date back to the 1970s and the New International Economic Order ("NIEO").¹⁸ In June 1976, the Guidelines for Multinational Enterprises ("Guidelines") were drafted as part of the broader "policy commitment" of the Declaration on International Investment and Multinational Enterprises, which was adopted within the framework of the Organization for Economic Co-operation and Development ("OECD").¹⁹ After numerous

15. *Id.* at 94–95 (characterizing social objectivism as "translating what [is] necessary for social solidarity").

16. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 178 (Apr. 11) "The subjects of law in any legal system are not necessarily identical in their nature of in the extent of their rights, and their nature depends upon the needs of the community." *Id.*

17. The fact that corporations are accredited more prerogatives than duties is not simply the result of the unwillingness or feebleness of the international community of states to set a complete general normative *corpus* for their obligations and the consequent responsibility in the case of violation. This *lacunae* in fact reflects a broader asymmetry in the development of general international law and can, equally, find explanation in the fact that the international realities generating the *necessity* to develop a broader international legal frame for the activities of the private factor are relatively new.

18. For an overview of the initiatives undertaken at the international level until recently, see ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS ON NON-STATE ACTORS 201, 201–531 (2006); Josep M. Lozana & Maria Prandi, *Corporate Social Responsibility and Human Rights*, in CORPORATE SOCIAL RESPONSIBILITY: THE CORPORATE GOVERNANCE OF THE 21ST CENTURY 183 (Ramon Mullerat ed., 2005); Olivier De Schutter, *The Challenge of Imposing Human Rights Norms on Corporate Actors*, in TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 1, 2–22 (Olivier De Schutter ed., 2006).

19. See Donald J. Johnson, *Promoting Corporate Responsibility: The OECD Guidelines for Multinational Enterprises*, in CORPORATE SOCIAL RESPONSIBILITY: THE CORPORATE GOVERNANCE OF THE 21ST CENTURY 243, 247 (Ramon Mullerat ed., 2005).

revisions, leading up to the most recent version in 2000, these Guidelines remain in force.²⁰ The provisions are in the form of recommendations by governments addressed to corporations operating in, or originating from, participating states, including members of the OECD as well as a very small number of non-member governments. The Guidelines contain non-binding principles and standards of good practices for responsible corporate behavior, which are complementary to the pre-existing legislation.²¹ As far as human rights are concerned under the Guidelines, corporations are expected to respect the human rights of the people affected by their activities consistent with the host government's international obligations.²² Although supervision remains voluntary and is characterized by the absence of sanctioning mechanisms, the effectiveness of the Guidelines is controlled by the network of National Contact Points,²³ which operate at a domestic level and cooperate with the Investment Committee.²⁴

The International Labour Organization's ("ILO") Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (the "Declaration") was added in 1977 to the list of the nonbinding

20. For the current version of the Guidelines, *see* ORG. FOR ECON. CO-OPERATION & DEV., THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2001), *available at* www.oecd.org/dataoecd/56/36/1922428.pdf [hereinafter "OECD Guidelines"].

21. *See* OECD Guidelines, *supra* note 20, Preface.

22. OECD Guidelines, *supra* note 20, Part II (suggesting that enterprises should "[r]espect the human rights of those affected by their activities consistent with the host government's international obligations and commitments."); *see also* ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 204–205 (2006).

23. *See, e.g.*, Final Statement by the U.K. National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (U.K.) Ltd., (Aug. 28, 2008), *available at* <http://www.berr.gov.uk/files/file47555.doc>. Global Witness accused Afrimex U.K. Ltd., *inter alios*, for having paid taxes to rebel forces in the Democratic Republic of Congo and for having practiced inadequate due diligence on the supply chain, by purchasing minerals from mines that used child and forced labor. *Id.* ¶ 6. The National Contact Point concluded that, although the accused corporation did not pay taxes to the rebel groups, its associated companies did so, with Afrimex failing to influence its associates. *Id.* ¶ 26–27, 39. With regard to the second main allegation, it was held that Afrimex in fact applied failed to exercise due diligence on the supply chain. *Id.* ¶ 51–62. However, since the National Contact Points lack authority to impose sanctions or order reparation for the violated rights of the victims, and their decisions are deprived of any binding effect, the statement in the *Afrimex* case limits its scope in a number of recommendations to the respondent company. *Id.* ¶ 63–77.

24. ORG. FOR ECON. CO-OPERATION & DEV., IMPLEMENTATION PROCEDURES OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2001), *available at* <http://www.oecd.org/dataoecd/56/36/1922428.pdf>. The Investment Committee is the OECD body responsible for providing clarification over the scope of the Guidelines and for overseeing their application. *Id.*

international documents calling for corporations to respect human rights.²⁵ Apart from referring to those rights afforded strictly under the ILO, such as the fundamental rights of workers, the Declaration contains a provision making specific reference to the ILO conventions, as well as the United Nations Universal Declaration of Human Rights ("UNDHR") and the Covenants.²⁶ Despite the soft law nature of the Declaration and the absence of any sanctioning mechanisms, member states are expected to report to the ILO's Governing Body on its implementation. The ILO Governing Body has the power to make recommendations to member states' governments and interpret—under a specific procedure for the examination of disputes—the provisions of the Declaration.

The third step toward the progressive development of investor's international human rights obligations coincided with the well-known United Nations Global Compact.²⁷ Among the principles announced by the United Nations Secretary General in 2000, the first two refer to the support and respect that corporations should demonstrate in the field of internationally proclaimed human rights within their sphere of influence, and to the obligation to avoid acts of complicity in human right abuses.²⁸ The next four principles are devoted to labor rights—namely, the freedom of association, the right to collective bargaining, the elimination of forced and compulsory labor, the abolition of child labor, and the prohibition of employment discrimination.²⁹ Following the "trend," the Global Compact presents itself as a nonregulatory "instrument" that does not provide for legal enforcement of its provisions. Instead, the Global Compact merely provides a framework for corporations to endorse voluntarily. At the same time, the Global Compact serves as a consensus-based political forum that involves, in the process of effecting values incorpo-

25. INT'L LABOR ORG., *TRIPARTE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY* (2006), *available at* <http://www.ilo.org/public/english/employment/multi/download/declaration2006.pdf>. The most recent version of the Declaration was adopted in March 2006. *Id.*

26. *See* UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. RES. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948), *available at* <http://www.un.org/en/documents/udhr/> [hereinafter "UNDHR"]. The Covenants referred to are the two main UN Covenants on human rights—Covenant on Civil and Political Rights and the Covenant on Social and Economic Rights.

27. For further information, see UNITED NATIONS GLOBAL Compact, <http://www.unglobalcompact.org> (last visited on Nov. 12, 2009).

28. UNITED NATIONS GLOBAL Compact, THE TEN PRINCIPLES, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Nov. 12, 2009).

29. *Id.*

rated in its ten principles, all the relevant social actors such as states, international organizations, and international private actors.³⁰

Finally, at the forefront of previous efforts to prevent corporate abuses of human rights is the 2003 United Nations' Norms on the Responsibilities of Transnational Corporations and other Enterprises with Regard to Human Rights (the "UN Norms"), recommended by the United Nations' Commission on Human Rights' Sub-Commission on the Promotion and the Protection of Human Rights.³¹ Contrary to the first three endeavors, the UN Norms were intended as "normative" in the prescriptive sense. Nevertheless, their current legal standing remains unsurprisingly limited to soft law. To the extent that the UN Norms do not restate preexisting law, they identify the need for further normative prescription in the field.³² They also have, as all soft law documents, an indisputably permissive effect,³³ serving as a basis for further regulation. Since the preamble of the UN Norms refers to UN treaties and other international instruments that set human rights standards, the proposed UN Norms are meant to be read in light of the existing international standards. While states bear the primary responsibility for ensuring the respect of international human rights standards, corporations also are expected to "promote, secure the fulfillment of, respect, ensure respect of and protect human rights" within their sphere of influence.³⁴ Although the UN Norms include provisions regarding implementation, monitoring (by the UN), and forms of reparation, the absence of clear-cut normativity sterilizes the UN Norms and diminishes the likelihood that the "instrument" could be made effective via domestic or international judicial interpretation. Consequently, a number of questions regarding the nature and ex-

30. Among others, the private actors include global civil society, the labor force, and of course, businesses.

31. U.N. ECON. & SOC. COUNCIL [ECOSOC], Sub-Comm. on the Promotion and Prot. of Human Rights, *Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26 2003) [hereinafter "UN Norms"]. Concerning the drafting history of the UN Norms, see David Kinley & Rachel Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6 HUM. RTS. L. REV. 447, 456–459 (2006).

32. Nils Roseman, *Business Human Rights Obligations – The "Norms of Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights"*, 23 NORDIC J. OF HUMAN RIGHTS 47, 48–60 (2005).

33. This is the case for both multinational corporations and states. Also, while multinational corporations may "self-restrict" their conduct so that it meets the standards of the UN Norms, national governments also have the power to impose these norms on the corporations through domestic legislation.

34. UN Norms, *supra* note 31, ¶ 1.

tent of investor obligations remain unanswered. For instance, while the obligations of the private actors are mainly limited in the *status negativus*³⁵ dimension of human rights, the question of affirmative obligations remains unclear.³⁶

Customary international human rights are *erga omnes* in that they are applicable against the entire world; thus, they are implicitly objective. Indeed, it is uncontroversial that certain universal values bind each and every subject of the international legal order, including nonstate actors.³⁷ Still, while it may be self-evident that investors are required to respect human rights, international law lacks a mature normative framework regulating *ad hoc* the human rights duties of corporations. Furthermore, no direct international legal enforcement mechanism exists for the human right obligations of the investor. In the absence of explicitly enforceable norms, efforts to sanction investors for transgressions fall flat. At present, the only tangible development with respect to investors is the self-restrictive ideal of "social accountability," which leaves much to be desired.³⁸

The blame for these shortcomings, however, should not be placed solely on states or international governmental bodies or institutions. General international law has always been a product of custom, reflecting practical social necessity that was often validated by a judge with the authori-

35. Jakob Ragnwaldh & Paolo Konopik, *The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, in CORPORATE SOCIAL RESPONSIBILITY: THE CORPORATE GOVERNANCE OF THE 21ST CENTURY 251, 254 (Ramon Mullerat ed., 2005).

36. It has been suggested that corporations have a positive duty to protect human rights in cases of certain categories or groups of individuals, such as their own workers or people residing on land owned by the corporation. See The Danish Institute for Human Rights, The Human Rights and Business Project, DEFINING THE SCOPE OF BUSINESS RESPONSIBILITY FOR HUMAN RIGHTS ABROAD, at 8-9, available at http://www.humanrightsbusiness.org/files/320569722/file/defining_the_scope_of_business_responsibility.pdf (last visit Dec. 20, 2009).

37. For example, the Institute of International Law suggested that "certain obligations bind all subjects of international law for the purposes of maintaining the fundamental values of the international community." Institut de droit international, Resolution: *Obligations Erga Omnes in International Law* (Aug. 27, 2005); see also UNDHR, *supra* note 26, Article 1 (providing: "All human beings . . . should act towards one another in a spirit of brotherhood."); UNDHR, *supra* note 26, art. 30 (providing: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.").

38. Corporate Social Responsibility is a set of discretionary corporate policies aimed at responding to social expectations. However, they lack legal enforceability. Cf., e.g., Christine Parker, *Meta-Regulation: Legal Accountability for Corporate Social Responsibility*, in HUMAN RIGHTS AND CORPORATIONS 335, 335-365 (David Kinley ed., 2009).

ty of which he or she disposed. In short, the process is ongoing—as long as global investments continue to raise complicated legal and moral issues, one should expect that the gaps discovered in the existing international legal framework will inevitably be filled.

Until the gaps discussed herein are filled, it is likewise inevitable that legal scholars and the practice itself will search for “substitute” solutions. However, these alternative legal frameworks can only be based on positive international law and its “realities,” among which the most profound is that of a legal order suffering from the “not-a-cat” syndrome.³⁹ The mere fact that private economic actors are referred to as “nonstate” illustrates the extreme extent to which the international legal system is state-centric. The law of the international community *lato sensu* remains in essence the result of the international community *stricto sensu*, which is the international community of states.⁴⁰ Accordingly, the duty to exercise control over corporations rests primarily with the state. While this may sound obvious when it comes to a host state exercising jurisdiction over investors’ actions or omissions occurring in or affecting that state, it ought to be an equally well-received principle even when a state lacks such a straightforward interest in the matter—for instance, when the state is home to the investor.⁴¹ Since states cannot assert territorial jurisdiction over resident investors for conduct taking place abroad, another jurisdictional basis is necessary if investors are to be policed by their home states for human rights transgressions.

39. Philip Alston, *The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in NON-STATE ACTORS AND HUMAN RIGHTS 3, 3–36 (Philip Alston ed., 2005). Alston criticizes the use of negatively defined terms, such as “non-state actors,” as well as the state-centric reading of international law by the means of comparison with the linguistic skills of his daughter at the age of eighteen months, when she was calling all animals as “not-a-cat.”

40. See, e.g., RENÉ JEAN DUPUY, *LA COMMUNAUTÉ INTERNATIONALE ENTRE LE MYTHE ET L’HISTOIRE* (1986); Pierre-Marie Dupuy, *La communauté internationale: une fiction?*, in JEAN J. A. SALMON, *DRIT DU POUVOIR, POUVOIR DU DROIT: MÉLANGES OFFERTS À JEAN SALMON* 373, 373–376 (2007); Robert Kolb, *Quelques réflexions sur la “communauté internationale,”* 10 AFR. Y.B. INT’L L. 431 (2002); Johannes van Aggelen, *Implementation of Article 28 of the Universal Declaration of Human Rights: A Reality Check*, 20 HAMLINE J. PUB. L. & POL’Y 1, 31 (2008).

41. As it will be explained below, the idea here concerns the exercise of parallel jurisdiction by the home state when the host state cannot or does not want to exercise its own jurisdiction for regulating and controlling the activities of the investor that threaten the enjoyment of human rights by the local population. See *infra* Part III.

B. Presumptions and Simplifications: The Gordian Knot of Nationality

To qualify as a "home state" or "state of origin," the state must have a particular association with the investing firm that is developing its activities abroad. General international law provides a number of practice-based criteria for determining the nationality of a legal person. In general, states enjoy absolute discretion to unilaterally establish conditions for granting nationality. If these conditions are met, they are given full effect within the domestic order of the state which granted its nationality to a subject (for instance, access to justice). However, the international opposability of nationality *vis-à-vis* the other states remains a controversial issue, mainly depending on the criterion of the effectiveness in the bonds between an individual person and the state which granted its nationality to that person.⁴² With respect to corporations, as the ICJ suggested with its famous dictum in the *Barcelona Traction* case, the two potential bases for determining nationality are the place of incorporation and the location of the corporation's administrative seat (the so-called effective seat or *siège social*).⁴³ The piercing of the corporate veil in order to investigate the nationality of the shareholders is not viable.⁴⁴ Accordingly, for the

42. For example, see the *Nottebohm* case before the ICJ. *Nottebohm Case* (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6). There, the Court refused to allow Liechtenstein to exercise diplomatic protection in favor of a formerly German citizen, which has only acquired its nationality during the war. The Court based its decision on the criterion of the effectiveness in the bonds between the state and its nationals. The nonopposability of the nationality conferred to Nottebohm at the international relations of Liechtenstein with Guatemala had no impact at all to the rights and obligations of Nottebohm within Liechtenstein's domestic legal order.

43. *Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 42 (Feb. 5); see also Article 9 of the International Law Commission Draft Articles on Diplomatic Protection which provides:

For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.

United Nations International Law Commission, Draft Articles on Diplomatic Protection, available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_8_2006.pdf. But cf. *Elettronica Sicula S.p.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. 15 (July 20) (where the Court, in order to determine the nationality of the corporation, proceeded with the foreign control test. However, this was what the two parties had expressly agreed in a prior treaty).

44. According to Article 25(2)(b) of the ICSID Convention, a "national of another Contracting State" is

purposes of this Article, a corporation acting abroad can be presumed to be either incorporated in its state of origin (transnational corporations), or linked with its state of origin by an alternative, informal, but effective link—namely, the location of its headquarters.

Since corporate law is not one of the fields of expertise of international lawyers, this Article will simplify discussions of multinational corporate structure as if limited to one parent company located in state X and several subsidiaries conducting business in countries A, B, and C. The seat of the parent company—effective or not—is deemed the home state. Although the subsidiary corporation might be incorporated in the host state, and may, as such, be an independent legal person within the latter's legal order, the parent company will be presumed to exercise decisive control over subsidiary policy-making and consequent practice.⁴⁵ Accordingly,

any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

ICSID Convention, ¶ 25(2)(b). As Christoph H. Schreuer suggests in his commentary on the ICSID Convention, since the second clause of Article 25(2)(b) provides expressly that the test of foreign control shall be applied in the case that the corporation has the nationality of the host state, the logic of systematic interpretation calls for accepting that in all other cases the foreign control test should be excluded. CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 278 (2001). The case law of ICSID tribunals supports Schreuer's analysis. *Id.* at 278–281 (providing the relevant ICSID case law and a list of the authors supporting this point of view).

45. In line with the language of the second clause of Article 25(2)(b) of the ICSID Convention, jurisdiction of the tribunals established under ICSID rules is extended to companies which, because of foreign control, the parties have agreed should be treated as nationals of another contracting party rather than the respondent (host) state. Foreign control constitutes the objective condition for both the applicability of this provision and the consequent extension of ICSID's jurisdiction. Accordingly, the contractual freedom of states parties to ICSID is conditioned by the respect of the criterion of the effective foreign control. In a recent ICSID award case, *TSA Spectrum de Argentina S.A. v. Argentine Republic*, the tribunal, after referring *in extenso* to the relevant international—and mainly ICSID—case law, suggested,

the ratio legis of [the second clause of Article 25(2)(b)] exception is the wording 'because of foreign control.' Foreign control is thus the objective factor on which turns the applicability of this provision. It justifies the extension of the ambit of ICSID, but sets the objective limits of the exception at the same time. . . . A significant difference between the two clauses of Article 25(2)(b) is that the first uses a formal legal criterion, that of nationality, whilst the second uses a material or objective criterion, that of 'foreign control' in order to pierce the corporate veil and reach for the reality behind the cover of nationality. Once the Parties have agreed to the use of the latter criterion for juridical persons having

the bridge between the state of origin and the firm incorporated in the host state, although lacking in formal terms, should correspond to the criterion of effectiveness of the parent's company control of its subsidiaries.⁴⁶ It goes without saying that the degree of effectiveness is subject to proof on a case by case basis.

C. Delimiting the Article's Focus: Excluding "Direct" Attribution and Complicity

Before moving on to this Article's chief focus—the due diligence obligation—the last point of logistics is to point out two legal bases which, although under certain conditions they may open the way to state responsibility for human rights abuses by the investor, *will not* be among the primary considerations of this discussion: “direct” attribution and complicity.

Acts or omissions of private entities are generally not attributable to states.⁴⁷ Accordingly, in principle, states are not internationally responsi-

the nationality of the host State, they are bound by this criterion as a condition for ICSID jurisdiction and cannot extend that jurisdiction by other agreements.

TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID award (W. Bank) ARB/05/05 2008, ¶ 139-141. “The text itself allows the parties to agree to lift the corporate veil, but only ‘because of foreign control,’ which justifies, but at the same time conditions, this exception.” *Id.* ¶147. The aim of the arbitrator should be the discovery of the real source of foreign control.

46. See Institut de Droit International, *Obligations of Multinational Enterprises and their Member Co.*, at ¶ 2 (Sept. 1, 1995), available at http://www.idi-il.org/idiE/resolutionsE/1995_lis_04_en.PDF (last accessed Nov. 10, 2009); Andrew J. Wilson, *Beyond Unocal: Conceptual Problems in Using International Norms to Hold Transnational Corporations Liable under the Alien Tort Claims Act*, in TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 43, 47, 63 (Olivier De Schutter ed., 2006) (examining the question of whether parent companies have an obligation of vigilance under the theory of “piercing the corporate veil”).

47. See JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY – INTRODUCTION, TEXT AND COMMENTARIES 91 (2002).

In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the Government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority. Thus, the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the State.

Id.

ble for the wrongful conduct of their nationals. However, there are exceptions. Article 8 of the International Law Commission's Draft Proposal on the Responsibility of States for Internationally Wrongful Acts (the "ILC Norms on State Responsibility")⁴⁸ provides that the conduct of a private individual *can* be considered an act of the state if the individual is in fact acting "on the instructions of, or under the direction or control, of that State" (*de facto* organ).⁴⁹ Outside this case, wrongful acts of individuals may be attributed to states in four other instances as well: (1) when any private entity (including a corporation)⁵⁰ is empowered by a state to exercise elements of the state's governmental authority (empowered entity),⁵¹ (2) when the state voluntarily endorses, or "acknowledges and adopts," the illicit conduct of a private actor (adopted agent),⁵² (3) in the case of insurrectional movements which become the new government of the state;⁵³ and (4) in the event of an "agency in necessity,"⁵⁴—that is, a situation where individuals are "in fact exercising elements of a governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of the elements of authority."⁵⁵

Of the above-mentioned five legal bases, only the first three could potentially allow for the attribution of investor human rights abuses to states, and only in highly unlikely scenarios. Thus, if direct attribution

48. U.N. INT'L LAW COMM'N [ILC], *Draft Proposal on the Responsibility of States for Internationally Wrongful Acts*, U.N. Doc. A/56/83 (Dec. 12, 2001) [hereinafter "ILC Norms on State Responsibility"].

49. The interpretation of Article 8 concerning the nature or the level of control that a State shall exercise over the behavior of the individual so that this behavior is directly attributable to it has opened a "Pandora's Box" towards the fragmentation of general international law. Compare *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶ 120 (July 15, 1999), with *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 64–65 (June 27), and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide case)* (Bosn. & Herz. v. Serb. & Mont.) (Judgment of Feb. 26, 2007), ¶ 406–07, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=2> (Judgment of Feb. 26, 2007). The International Criminal Tribunal for Former Yugoslavia ("ICTY") in *Tadic* diverted from ICJ's "effective control" test set forth in the *Nicaragua* judgment and introduced a less strict level of control, described as "overall." *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶ 120 (July 15, 1999). In response, the ICJ, in the *Genocide* decision criticized ICTY's proposed basis and insisted on its own *Nicaragua* test. *Genocide Case*, ¶ 406.

50. CRAWFORD, *supra* note 47, at 100.

51. Only governmental activities, and not commercial ones, of a corporation acting as an "empowered entity" may be attributed to states. *Id.* at 101.

52. *Id.* at 121–23.

53. *See id.* at 116–20.

54. *Id.* at 114.

55. *Id.*

were the only available basis, a large number of investor human rights violations would be left outside the scope of state international responsibility.

As far as the second legal basis that is excluded by the analysis of this Article is concerned, while states are often complicit in investor human rights abuses, the international legal framework regarding such complicity appears to be rather elliptic and problematic. According to Article 16 of the ILC Norms on State Responsibility, a state may be internationally responsible as complicit when it provides aid or assistance for an act that would be internationally wrongful if committed by the state itself, with knowledge of the circumstances of the act.⁵⁶ The very fact that Article 16 governs instances where a state is complicit in the acts of another state but fails to concern itself with instances in which a state is complicit in the acts of private entities serves as another perfect illustration of the asymmetrical development of general international law. However, this is just one side of the coin.

The framework regulating corporate complicity, though in its infancy, goes well beyond that of state complicity. Leaving aside the regulation of state complicity in international crimes,⁵⁷ it is important to return to the

56. See *id.* at 148.

57. Referring specifically to the issue of complicity in international crimes by multinational corporations, Andrew Clapham gives the example of the 2002 *Unocal* case before the domestic courts of United States on the basis of the Alien Tort Claims Act. Andrew Clapham, *State Responsibility, Corporate Responsibility, and Complicity in Human Rights Violations*, in RESPONSIBILITY IN WORLD BUSINESS: MANAGING HARMFUL SIDE-EFFECTS OF CORPORATE ACTIVITY 50, 60–65 (Lene Bomann-Larsen & Oddny Wiggen eds., 2004); see also *infra* Part III.A.1. The *Unocal* case concerned crimes, involving forced labor, committed by the army of Myanmar in favor of the defendant-corporation. One of the issues addressed in the case was the appropriateness of attributing those crimes to Unocal, in whose interest the army acted. Despite the fact that the claim concerned a tort and not a crime, the American courts found it appropriate to refer to international criminal law and concluded that, although under international criminal law the support provided by the individual shall have a substantial effect, complicity does not require full participation in the execution of an international crime. *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *reh'g granted*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed per stipulation and judgment vacated*, 403 F.3d 708 (9th Cir. 2005). In a recent case, the United States Court of Appeals for the Second Circuit articulated a high standard for establishing that a corporation has aided and abetted a government in breaching human rights. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009). Under this standard, mere knowledge of the human right breaches is insufficient under the ATCA for establishing the responsibility of a corporation; instead, for a finding of corporate responsibility, intent to further the breaches must be shown. *Talisman Energy*, 582 F.3d at 259. (“Thus, applying international law, we hold that the *mens rea* standard for aiding and abetting liability in [ATCA] actions is purpose rather than knowledge alone. Even if there is a sufficient international consensus for imposing

UN Global Compact, which, from its own perspective, draws a broader picture. The comments to the Global Compact regarding the second principle that prohibits complicity, introduce an artful typology of the concept, classified as direct, beneficial, and silent.⁵⁸ According to the comments, corporations are not only expected to avoid behaviors that are directly complicit with state abuses of human rights, but also must not benefit from such abuses and must refrain from acts that might undermine state efforts to protect human rights.⁵⁹ Although the UN Norms do not make explicit use of the term “complicity,” the attributes described are equally concrete. According to paragraph 3 of the UN Norms, corporations should not “engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labor, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law.”⁶⁰ Similarly, paragraph 11 requires that corporations “refrain from any activity which supports, solicits, or encourages states or any other entities to abuse human rights,” and should “seek to ensure that the goods and services they provide will not be used to abuse human rights.”⁶¹

The *prima facie* normative asymmetry between the concept of complicity introduced by the ILC Norms on State Responsibility and the two above-mentioned documents is self-evident. However, one could argue that such a comparative approach lacks substance. While the UN Norms aim at setting primary substantive obligations, the ILC Norms on State Responsibility refers to secondary obligations, which become applicable

liability on individuals who *purposefully* aid and abet a violation of international law ... no such consensus exists for imposing liability on individuals who *knowingly* (but not purposefully) aid and abet a violation of international law.” (emphasis in the original) (internal citation omitted).).

58. United Nations Global Compact, The Ten Principles: Principle Two, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle2.html> (last visited August 3, 2009).

59. See Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMP. L. REV. 339, 339–349 (2001). The analysis proposed by Clapham and Jerbi moves in the direction of confirming the existence of an obligation for corporations to adopt one certain positive measure against human rights violations. According to Clapham and Jerbi, in order for a corporation not to be accused of “silent complicity,” it is expected to “raise systematic or continuous human right abuses with the appropriate authorities.” *Id.* at 347–48.

60. UN Norms, *supra* note 31, ¶ 3.

61. UN Norms, *supra* note 31, ¶ 11.

only if a state violates a primary obligation.⁶² However, as has been noted by scholars, the way in which the ILC Norms on State Responsibility treat complicity bears a strong resemblance to the identification of a primary norm.⁶³

To the extent that this argument is valid, it justifies the comparison of the two parallel normative frameworks. It is noted then that, despite the fact that the soft-law prohibition on private entity complicity in state human rights abuses is broader than the prohibition on state complicity, *both* states and investors have a substantive, core international obligation not to "aid or assist" each other in violating international human rights norms. Recognition of this implicit parallel is an important step toward remedying the abovementioned normative asymmetry. Its extension into practice could be achieved on the basis of Article 16 of the ILC Norms on State Responsibility. First, state complicity could, by the means of analogy of law, be extended so that it also covers complicity in private wrongful acts. Second, the criteria introduced by Article 16 can, also by analogy of law, serve as the basis for establishing the responsibility of corporations that aid or assist states in perpetrating human rights abuses.⁶⁴

However, even if analogy of law would prove an effective solution, another asymmetry would still substantially differentiate state complicity from investor complicity. While there is a full set of secondary international obligations for states, private international responsibility remains

62. Crawford, *supra* note 47, at 77.

Article 1 states the basic principle underlying the articles as a whole, which is that a breach of international law by a State entails its international responsibility. An internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both. Whether there has been an internationally wrongful act depends, first, on the requirements of the obligation which is said to have been breached and, secondly, on the framework conditions for such an act, which are set out in Part 1. The term 'international responsibility' covers the new legal relations which arise under international law by reason of the internationally wrongful act of a State. The content of these new legal relations is specified in Part Two.

Id.

63. See, e.g., Bernhard Graefrath, *Complicity in the Law of International Responsibility*, 29 REVUE BELGE DE DROIT INTERNATIONAL 370, 372 (1996) (Belg.). Although the author's comments are made on the basis of an earlier draft of the ILC Norms on State Responsibility, they remain opportune. See Crawford, *supra* note 47, at 146–147 (stating that the responsibility for complicity is "in a sense derivative").

64. Clapham, *supra* note 57, at 67–68.

limited to the criminalization of a very limited number of heinous acts.⁶⁵ This situation, complemented by the absence of a mature set of primary international norms against human rights abuses by corporations, deprives the analogy of law technique of an adequate practical effect.

Last but not least, it is important to note that the absence of a framework explicitly regulating state complicity in private wrongfulness does not come free of consequences. First, there is always the danger of imprudently widening the concept of “*de facto* organ.”⁶⁶ Second, conceptual expansions in legal scholarship have already caused confusion between the concepts of due diligence and complicity.⁶⁷ In fact, the dividing line between the facilitation of a wrongful act (complicity) and the failure to attempt to prevent or prohibit the act by available means (due diligence) may be much finer than assumed. As such, the issue of complicity between states and corporations in human rights abuses will also be omitted from the analysis that follows, and the focus will fix on the extent that inadequate due diligence on behalf of the state authorities, can give rise to international responsibility.

II. STATE RESPONSIBILITY UNDER THE DUE DILIGENCE PRINCIPLE

Such an endeavor entails two assumptions: (1) the rebuttable presumption that business practice is completely independent from any type of State influence and (2) the assumption that positive international law sets such state obligations. The analysis that follows aspires to prove the existence of a set of relevant primary international obligations for the state of origin, the violation of which leads to the state's international responsibility for the human rights abuses committed by its investors in the territory of a third state, even though the abuses are not attributable to the state.

As defined above, the due diligence principle of international law provides that every state should, to the best of its respective ability, fight

65. The ILC explains in its *Commentaries* on Article 58 of the ILC Norms on State Responsibility that “so far the principle has operated in the field of criminal responsibility, but it is not excluded that developments may occur in the field of individual civil responsibility.” See Crawford, *supra* note 47, at 312. The United States’ Alien Tort Claims Act (the “ATCA”) provides a good example. Although it produces its effects at the domestic level, the ATCA makes a positive contribution towards developments in the field of individual civil responsibility on the international level. See *infra* Part III.A.1.

66. See Eduardo Savarese, *Issues of Attribution to States of Private Acts: Between the Concept of De Facto Organs and Complicity*, 15 ITALIAN Y.B. INT’L L. 111, 111–136 (2005).

67. Dictionnaire de Droit International Public [Dictionary of Public International Law] 218–19 (Jean Salmon ed., 2001) (Fr.).

breaches of international law by implementing preventive and punishment measures.⁶⁸ It is common knowledge that states may generally be held internationally responsible for: (1) their own wrongful acts or omissions (negative duty to abstain from wrongfulness), (2) the wrongful acts or omissions of third subjects of international law which are attributable to them, or (3) being negligent in their primary/substantive obligation to be vigilant, that is, to behave in a way that will aim—through prevention or/and *ex post facto* punishment—at ensuring that no damage will occur to the rights of third subjects as a result of situations or of wrongful conduct by persons falling into their jurisdiction (positive duty to protect). This third basis corresponds to due diligence. It is true that, unlike the first two legal bases for state responsibility, the due diligence principle does not find any explicit legal confirmation in the ILC Norms on State Responsibility⁶⁹ and lacks an objective element.⁷⁰ Despite that, the fol-

68. For a thorough analysis of the concept see RICARDO PISILLO MAZZESCHI, "DUE DILIGENCE" E RESPONSABILITÀ INTERNAZIONALE DEGLI STATI (1989).

69. It is generally accepted that both the first and the third categories are part and parcel of the general prohibition on states to breach an international obligation (found in Articles 1, 2 and 12 of the ILC Norms on State Responsibility). The only (implicit) reference made by the ILC Norms on State Responsibility to due diligence is found in Article 14(3) which refers to the temporal dimension of the obligations to prevent and according to which, the wrongful act for failure to prevent is a continuous one. ILC Norms on State Responsibility, *supra* note 48, art. 14(3). The ILC *Commentaries* are more instructive, particularly in commenting on Articles 9 and 10 of the ILC Norms on State Responsibility. Article 10(3) of the ILC Norms on State Responsibility—which concerns the attribution to the state of the wrongful acts of an insurrectional movement which became the new government of that state—stipulates that "this article is without prejudice to the attribution to a State of any conduct . . . , which is to be considered an act of that State by virtue of articles 4 to 9." *Id.* art. 10(3). Accordingly, even before the insurrectional movement assumes any governmental functions, its behavior may, pursuant to the Article 9 "agency in necessity" provision, be directly attributed to the state. In remarking on these provisions, the ILC *Commentaries* explain that "exceptional cases may occur where the State was in a position to adopt measures of vigilance, prevention or punishment in respect of the movement's conduct but improperly failed to do so." Crawford, *supra* note 47, at 120. The ILC *Commentaries* effectively attest to the fact that positive international law contains an obligation for states to be vigilant and to adopt measures in order to prevent and punish wrongful private conduct. Thus, it has been correctly argued that, in an "agency in necessity" case, "a better rationale for holding the State responsible is its failure to fulfill its functions." Jan Arno Hessbruegge, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, 36 N.Y.U. J. INT'L L. & POL. 265, 274 (2004). Nonetheless, it is reasonable to ask why a state should, in an "agency in necessity" situation, be burdened with the wrongful acts of an entity which—far from being its organ or acting according to its will—"usurps" its functions. In other words, why does the ILC opt to establish a clause of direct attribution to the state of illicit conduct that has not been committed by its organs, while there already exists an alternative legal basis—due diligence—for holding that very same state internationally respon-

lowing discussion will demonstrate that the foundations of due diligence within positive international law are well established and that this principle sets up a substantive set of state obligations, taking the form of goals to be achieved or of standards to be attained. Accordingly, when it comes to business practices that are independent of state influence, the due diligence principle should legitimately render a state an active player with a positive duty to protect human rights rather than a mere passive observer of wrongful acts. But first, some background on the origins of the due diligence principle will be instructive.

A. The Origins of the Due Diligence Standard and Its Twofold Nature

Although the source of the due diligence principle can be traced to international judicial practice long before its indirect confirmation by the ICJ,⁷¹ it is mainly after that court validated some of its normative expressions that a consensus⁷² arose within legal scholarship on the idea of con-

sible? Potentially, the answer is that the obligations stemming from due diligence are—as will be discussed below—subject to limitations and circumstances that preclude wrongfulness. See *infra* Part II.C. Furthermore, the term “agency in necessity” actually reflects an exceptional “state of necessity”—a situation which calls for higher standards of protection than those offered by due diligence. Finally, even if the highly improbable situation of a multinational corporation acting as an “agent in necessity” occurred, the necessity element found at the basis of the direct attribution of the private conduct to the state would lead to holding the host state, and not the state of origin, exclusively. As such, this Article looks to the “arena” of primary state obligations, emphasizing due diligence. Despite its inherent limits, the concept of due diligence offers the advantage of an ample and solid basis to cover each and every internationally wrongful act of the investor.

70. See *infra* Part II.C.

71. Providing one of the most classic examples of the application of the due diligence principle in pre-ICJ international judicial practice, the 1872 *Alabama* case involved the breach by the United Kingdom of its due diligence obligations in light of its failure to comply, through prevention or punishment of the activities of persons found under its jurisdiction, with its duties of neutrality in times of maritime war. See THOMAS WILLING BALCH, *THE ALABAMA ARBITRATION* (1900). In the 1928 *Island of Palmas* case, the tribunal stated that “[t]erritorial sovereignty . . . has as corollary a duty: the obligation to protect within the territory the rights of other states.” *Island of Palmas Case (or Miangas) (U.S. v. Neth.)* (Perm. Ct. Arb. 1928) at 9, available at <http://www.pca-cpa.org/upload/files/Island%20of%20Palmas%20award%20only%20+%20TOC.pdf>. For the judicial history of the due diligence principle in the twentieth century, see Robert P. Barnidge, *The Due Diligence Principle under International Law*, 8 INT'L COMMUNITY L. REV. 81, 92–121 (2006).

72. Although there seems to be a consensus over the existence of the “generic” concept of due diligence, there are still voices denying its extent or applicability in certain fields. See, e.g., John H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 AM. J. INT'L L. 291 (2002) (challenging the applicability of the due diligence concept in environmental law).

firming an international principle of customary nature in positive international law.⁷³ The ICJ, in the *Corfu Channel* case, referred to “every [s]tate’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other [s]tates.”⁷⁴ Several years later, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ provided in very similar terms another confirmation of the principle, this time in the field of environmental law.⁷⁵ According to the dictum in that opinion, there exists “a general obligation of [s]tates to ensure that activities within their jurisdiction and control respect the environment of other [s]tates or of areas beyond national control.”⁷⁶ Finally, the situation in the occupied Palestinian territories offered the ICJ the possibility of stating, in its opinion, that given the “numerous indiscriminate and deadly acts of violence” against the civilian population of Israel, “it has the right, and indeed the duty, to respond in order to protect the life of its citizens.”⁷⁷

The absence of an explicit reference by the ICJ to the term “due diligence” finds a possible explanation in the fact that, in substance, this concept corresponds to a generic notion—a sort of a matrix from which a general type of “pilot” or “guide” obligation derives, which takes a concrete content and finds an application in various fields or sub-disciplines of international law. The structure of the due diligence model sets up for states the dual obligation to punish past and prevent future internationally wrongful acts.⁷⁸ The punitive dimension of due diligence, in turn, reflects a twofold objective: (1) to prevent the repetition of the illicit act, and (2) if it is continuing, to cease it.⁷⁹ Due diligence covers a vast portion of international law; it spans various subjects and issues,⁸⁰ including the law

73. It is interesting to note that the ICJ never deemed it necessary to examine the customary nature of due diligence since it merely stated the existence of a “general obligation.”

74. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 22 (April 9).

75. *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8).

76. *Id.* at 241–42; see also *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, 41 (Sept. 25) (directly quoting the same dictum).

77. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 195 (July 9).

78. *Dictionnaire de Droit International Public*, *supra* note 67, at 770.

79. Since the scope is identical, these two objectives of the due diligence principle can be aptly compared with Article 30 of the ILC Norms on State Responsibility which imposes a requirement of cessation and non-repetition of illicit conduct by state authorities.

80. See Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 GERMAN Y.B. OF INT'L L. 9, 22–41 (1992) (de-

of neutrality, environmental law, the security of foreign states and their representatives, and, of course, the international protection of human rights.

That being said, it is easy to understand why due diligence is classified as a “principle,”⁸¹ in that it expresses a general substantive state obligation that serves as a vehicle for the expansion of the effect to be given to specific rules or norms of international law via deductive reasoning.⁸² However, it would not be a mistake to describe the due diligence principle in terms of an international standard as well. The *Dictionnaire de droit international public* provides two definitions of a “standard” that are useful in conceptualizing due diligence. According to the first definition—which is almost identical to the definition of the term “principle” as described above—a standard is a “norm of a high level of abstraction and generality, which, although as such cannot be applied without first undergoing concretization, its juridicization is incontestable.”⁸³ Therefore, be it either a standard or a principle, the due diligence norm introduces a general normative framework of positive international law, which requires that states adopt affirmative measures for preventing and sanctioning internationally unlawful conduct. However, due diligence lacks a concrete content and effect until it is applied with regard to a specific international norm or rule—for example, the protection of human rights.

The second pertinent definition of a “standard” corresponds to the idea of *minimum* requirements. In this sense, a standard is a norm implying that there is a “level” to reach or a “model” by which one has to abide and with regard to which the evaluation of a situation or of a conduct has

tailoring the various areas of international law within which the due diligence principle has been applied).

81. Luigi Condorelli, *The Imputability to States of Acts of International Terrorism*, 19 ISRAEL Y.B. ON HUM. RTS. 233, 240 (1989).

82. Dictionnaire de droit international public, *supra* note 67, at 876–77 (defining “principle” as: “proposition de portée générale, présentée sous une forme ramassée et synthétique, exprimant une norme juridique d’une importance particulière et susceptible de servir de fondement à des règles de droit par le biais d’un raisonnement déductif”). *But see* Timo Koivurova, *What Is the Principle of Due Diligence?*, in NORDIC COSMOPOLITANISM: ESSAYS IN INTERNATIONAL LAW FOR MARTTI KOSKENNIEMI 341, 346 (Jarna Petman & Jan Klabbers eds., 2003) (arguing that due diligence is a “principle of equity, triggered when a dispute arises and requiring a more careful balancing of the situation than the standard juristic approach of finding out whether a state has breached international law or not”).

83. Dictionnaire de droit international public, *supra* note 67, at 1049 (defining a “standard” as a “norme d’un haut niveau d’abstraction et de généralité, et dont le contenu doit être concrétisé pour son application, mais dont la juridicité est incontestée”).

to be made.⁸⁴ To view the due diligence principle as imposing *minimum* standards is to imply the existence of a universally common minimal level of affirmative conduct expected of states at the international level. Thus, failure to satisfy the due diligence principle amounts to a wrongful act by omission, which opens the door to designations of state responsibility at the international level. Furthermore, legal scholars distinguish the international principle of due diligence from the concept of "*diligentia quam in suis*"—that is, the vigilance that a state exercises with respect to its own affairs.⁸⁵ Indeed, demonstrating a level of diligence equivalent to that applied at the domestic level is not sufficient to satisfy the *minimum* standard of conduct set by the international due diligence obligation.⁸⁶

The generic nature of the due diligence principle is a factor decisively affecting the determination of the *minimum* standard of state affirmative action in a given field of policy. As mentioned above, since due diligence can be seen as a sort of matrix, it can only take on full and concrete shape and effect if complemented by a specific rule of international law. The nature, the content and the sphere of application of that specific rule that is "integrated" or "embodied" into the due diligence matrix is significant for the content of the due diligence minimum standard itself. In other words, the actual content of the standard changes depending on the positive law at issue—the "minimum" action that will be sufficient to satisfy the due diligence obligation will vary according to the specific type of wrong-doing to be prevented or punished, *and* according to the particular circumstances and context that form the backdrop for the wrongdoing. The following section outlines how due diligence finds an application in the field of human rights protection at international level and the effect that both civil and social rights take when applied in its light. The examples have been chosen with a focus on clarifying and expounding upon the theoretical scheme described above.

B. The Positive Effect of Human Rights under the Due Diligence Standard

Before discussing the precise state obligations that arise under the due diligence principle with respect to civil and social rights, some background on the normative quality of human rights will be helpful. Public

84. *Id.* (providing a second definition of a "standard" as a "norme impliquant l'idée d'un 'niveau' à atteindre ou d'un 'modèle' auquel il faut se conformer et par rapport auquel l'évaluation d'une situation ou d'un comportement doit être opérée" and giving "due diligence" as an example).

85. See Pisillo-Mazzeschi, *supra* note 80, at 41–46 (presenting relevant case law).

86. *Id.* at 41.

international law contains a *corpus* of customary “fundamental” rights of the human being, and although the vocabulary of international law does not provide a definition of the notion of “fundamental” rights the concept forms part of the casual jargon and reflects the notion of universally accepted rights of human beings. Although a complete and exhaustive “bill” of fundamental human rights does not exist at the international level, the view that such a bill should, at minimum, include the rights enumerated in the UN Universal Declaration of Human Rights enjoys wide acceptance among legal scholars.⁸⁷ Furthermore, it is undoubtedly certain that the list of “fundamental” human rights exceeds the rights protected by the *Universal Declaration*.

The protection of human rights at the international level reflects the essential belief of the whole international community that states, as the central subjects of the international legal order, adhere to certain values that are generally recognized as common to the entire international society. Stated differently, general international law norms regarding human rights, customary human rights, or universal human rights imply obligations *erga omnes* (i.e., obligations that each state owes to the international community as a whole).⁸⁸ Since these are objective, non-synallagmatic obligations, they are owed vis-à-vis the entire international community and thereby exclude any type of reciprocity.

Viewed from this framework, Karel Vasak's famous classification of human rights into three “generations” is more than just an empirical summary of the historical developments of protection of human rights at the international level.⁸⁹ Through an analogy to the three themes of the

87. Concerning the scholarly reception and the impact of the Universal Declaration in institutionalization of the fundamental rights of the individual, see, for example, Jochen von Bernstorff, *The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law*, 19 EUR. J. INT'L L. 903 (2008). But see A. CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 299 (1986) (arguing that the Universal Declaration “in formal terms is not legally binding, but possesses only moral and political force”).

88. There is a substantive number of human rights (or of special expressions of the “fundamental” ones) whose normativity derives exclusively from international conventions. These rights lack a general normative effect and, being “inter-subjective,” they are limited to the circle of the contracting *instrumentum* parties. However, for precisely the same reasons that lead to the qualification of general human rights norms as *erga omnes*, human rights obligations deriving from a multilateral international treaty are of *erga omnes partes* nature.

89. See Karel Vasak, *A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights*, UNESCO COURIER, Nov. 1997, at 29; see also Philip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 NETH. INT'L L. REV. 307, 307–310 (1982) (referring to the unpublished inaugural lecture of Karel Vasak before the Interna-

French Revolution, Vasak traces the philosophical and historical origins and the *raison d'être* that underlies the international protection of human rights through the course of its evolution. Under the Vasak typology, the first-generation civil and political rights stem from liberty and produce their effect in line with the exigencies of that notion. According to the libertarian logic, the primary state obligation is of a negative nature and requires that domestic authorities abstain from any interference with individual liberty. Since the norm is exclusively focused on state's abstention from action, it therefore results in a "hands-off" *status negativus* policy. In contrast to the line of reasoning derived from libertarian notions, the second-generation's social and economic rights stem from equality. States, under the egalitarian rationale, are required to adopt necessary positive measures (*status positivus*) that ensure the enjoyment of recognized rights by all humans. Lastly, the normative theme of fraternity calls for solidarity as the necessary condition for realization of universal aims reflecting values such as international peace and development. Such values can only be promoted collectively through the combined efforts of the entire international community.

1. Civil Rights

Civil rights were initially formed in a "negative" way, and accordingly, only required a minimal level of engagement from the states. Under this conceptualization, in order to avoid committing a wrongful act, a state simply had to abstain from any interference with individual civil rights. As a result, civil rights initially excluded from their semantic field any type of positive action.⁹⁰ The integration of due diligence positive duties within the first-generation rights eventually occurred largely through judicial practice that was primarily influenced by constitutional theory.⁹¹

tional Institute of Human Rights entitled "For the Third Generation of Human Rights: The Rights of Solidarity" conducted July 2–27 in Strasbourg).

90. Unless, of course, the norm's wording expressly included an obligation to prevent or punish. For example, Article 2 of the European Convention sets forth that "everyone's right to life shall be protected by law." European Convention on Human Rights art. 2, Nov. 4, 1950, 213 U.N.T.S. 222.

91. This is particularly the case with the German theory of *Drittwirkung*, under the terms of which, an individual shall have direct access to justice against another individual who violated her or his human rights. Denis Alland explains that the libertarian idea rules equally the positive obligations for the protection of civil rights—since the individual abandoned his or her natural liberty in favor of the state, the latter is under a positive obligation to protect the individual against third individuals. Denis Alland, *Observations sur le devoir international de protection de l'individu*, in *LIBERTÉS, JUSTICE, TOLÉRANCE: MÉLANGES EN HOMMAGE AU DOYEN GÉRARD COHEN-JONATHAN* 13 (L. Condorelli ed., 2004). Samantha Besson in turn places the emphasis on—among other—human dignity.

This development was gradual and reflected the necessity of providing individuals with maximum protection of their human rights. Through this evolution, the semantic field of the norms protecting civil rights was expanded in a way that would develop a broader practical effectiveness (*effet utile*).⁹² The emphasis was explicitly placed on the teleology, focusing on the “aim and purpose” of the norm. A “dynamic” reading of the norm enabled its content to be continuously redefined, allowing it to be adapted to the social momentum at the time, as well as to the particular circumstances of a given case.

The Inter-American Court of Human Rights (“ICHR”) perfectly summarized the nature of the positive duties that states have under the American Convention on Human Rights (“ACHR”) and described their relation to the due diligence principle in its very famous *Velasquez Rodriguez* case.⁹³ There, the Court stated:

[I]n principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the state. However, this does not define all the circumstances in which a state is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the state might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.⁹⁴

With respect to the question of how the due diligence principle is concretely applied in the field of human rights, the *Velasquez Rodriguez* Court noted that states have the obligation

to “ensure” the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation

Samantha Besson, *Les obligations positives de protection des droits fondamentaux: Un essai en dogmatique comparative*, 122 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 49, 72–73 (2003). For a comparative perspective, see Besson, *supra*, at 57–96.

92. Frédéric Sudre, *Les “obligations positives” dans la jurisprudence européenne des droits de l’homme*, in PROTECTION DES DROITS DE L’HOMME: LA PERSPECTIVE EUROPÉENNE – MELANGES A LA MÉMOIRE DE ROLF RYSSDAL 1359, 1361 (Paul Mahoney, Franz Matscher, H. Petzold and Luzius Wildhaber eds., 2000).

93. *Velásquez-Rodríguez v. Honduras*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (1988) (July 29, 1988) (the case concerned the detention and subsequent disappearance of a Honduran student).

94. *Id.* ¶ 172.

implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.⁹⁵

Likewise, the Human Rights Committee (“HRC”), which monitors the implementation of the UN International Covenant on Civil and Political Rights (“ICCPR”), described the ICCPR obligations as both negative and positive in nature.⁹⁶ With respect to the positive dimension of the obligations, the HRC noted that states are expected to “adopt legislative, judicial, administrative, educative, and other appropriate measures in order to fulfill their legal obligations.”⁹⁷ Furthermore, according to the HRC,

the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.⁹⁸

For its part, the European Court of Human Rights (“ECHR”), despite having developed a rich case law on positive human rights duties as early as the 1970s, provided only a general basis for the *status positivus* effect of the European Convention on Human Rights (the “European Convention”) in the *Ilașcu* judgment.⁹⁹ Article 1 of the European Convention, which sets forth the general obligations of states to secure for everyone within their jurisdiction the rights protected by the European Convention, is the basis of the various and multiple expressions of the due diligence

95. *Id.* ¶ 166.

96. United Nations, Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 6, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 25, 2004) [hereinafter *General Comment No. 31*].

97. *Id.* ¶ 7.

98. *Id.* ¶ 8.

99. *Ilașcu v. Moldova and Russia*, 2004-VII Eur. Ct. H.R. 179.

principle within the ECHR's case law. Although the *Ilașcu* Court made no express reference to the due diligence principle, it did state that "[t]he undertakings given by a [c]ontracting [s]tate under Art. 1 of the [European] Convention include, in addition to the duty to refrain from interfering with enjoyment of the rights and freedoms guaranteed, positive obligations to take appropriate steps to ensure respect for those rights and freedoms within its territory."¹⁰⁰

Thereby, through the principle of due diligence, positive duties of states to prevent and punish violations of first-generation rights found their place next to "classic" negative obligations. However, the line between prevention and punishment is somewhat blurred where prevention policy is pursued through sanctions that aim to deter wrongful conduct. In general, the affirmative action of state authorities should simply aim to end ongoing human rights abuses and prevent their repetition.

The need for positive protection arises in situations where the enjoyment by citizens of their civil rights is threatened by something other than state acts.¹⁰¹ With respect to human rights abuses by third parties (such as foreign investors), the first-generation norm creates an affirmative "quasi-horizontal" effect, which imposes an obligation upon the state to adopt—for the benefit of subjects under its jurisdiction—the necessary

100. *Ilașcu*, 2004-VII Eur. Ct. H.R. at 263.

101. The concept of threats caused by reasons other than state acts includes both threats caused by the conduct of individuals, as well as threats coming from natural phenomena or general situations. Concerning this second dimension, see the case law presented by Besson, *supra* note 91, 79–80. The case-law of the ECHR presents several examples of situations which are not the result of the conduct of a third subject. See generally A.R. MOWBRAY, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS (2004) (detailing ECHR case law on positive obligation, including cases discussing official recognition of transsexuals, the official recognition of the choice of names, and the provision of free of charge legal assistance). The first and most famous case in this category was *Marckx v. Belgium* which involved the legal status of children born outside of a marriage. The ECHR explained that

[b]y proclaiming in paragraph 1 the right to respect for family life, Article 8 signifies firstly that the State cannot interfere with the exercise of that right otherwise than in accordance with the strict conditions set out in paragraph 2. . . . the object of the Article is 'essentially' that of protecting the individual against arbitrary interference by the public authorities Nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life."

Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) at 15 (1979).

positive measures for prevention and prohibition of human rights abuses by third parties.¹⁰²

In juxtaposition to the classic "vertical"¹⁰³ dimension of the protection, which allows the individual to bring claims against the state for wrongful conduct in violation of individual rights which is directly attributable to it, the indirect horizontal aspect of the protection permits the individual to bring a similar legal claim (for violation of his or her substantive rights) against the state where the state authorities failed to demonstrate due diligence by reasonably preventing and/or punishing behavior committed by a third party (even though such third-party acts or omissions are not directly attributable to the state). However, this horizontal effect is indirect¹⁰⁴ and, therefore, it does not extend to the point where the violated individual is authorized to bring a legal claim directly against the third party on the basis of a violation of an international human rights norm.¹⁰⁵

The ECHR confirmed the indirect horizontal effect of the European Convention on several occasions, including the widely cited *X and Y* case regarding a prohibition on individuals from initiating criminal proceedings within the Dutch legal order against a person who sexually abused a mentally handicapped minor.¹⁰⁶ The ECHR pointed out that the European Convention is "designed to secure respect for private life even in the sphere of relations of individuals between themselves," and found the respondent state responsible for failing to adopt positive legislative measures that would facilitate the prosecution of an individual violating a right protected by the European Convention.¹⁰⁷

Having concluded with the theoretical framework that set forth the effect of due diligence on civil rights, it is necessary to turn the analysis

102. Dean Spielmann, *Obligations positives et effet horizontal des dispositions de la Convention*, in *L'INTERPRÉTATION DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME* 133 (Frédéric Sudre ed., 1998).

103. The vertical dimension of human rights protection stems from the *status negativus* effect of human rights norms. If state organs unlawfully interfere with the rights of the individual, then that individual is entitled to bring claims against the state for its internationally wrongful conduct.

104. Spielmann, *supra* note 102.

105. General Comment No. 31, *supra* note 96, ¶ 8.

106. *X and Y v. Netherlands*, 91 Eur. Ct. H.R. (ser. A) at 8–9 (1985).

107. *Id.* at 11, 22; see also Plattform "Ärzte für das Leben", 139 Eur. Ct. H.R. (ser. A) at 12 (1988) ("Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11. Like Article 8, Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be.").

toward a more concrete “case-study,” that will illustrate how the sphere of application of a given civil right is in practice expanded through due diligence and develop the consequent concrete state obligations. Arguably, from the perspective of due diligence, the most thoroughly examined human right is the “right to life.” The right to life is referred to in Article 2 of the European Convention, which expressly requires that states must prevent violations of this right.¹⁰⁸ Therefore, as noted by the ECHR, the preventive dimension of the obligation requires

[s]tate[s] not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction This involves a primary duty on the [s]tate to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.¹⁰⁹

However, as illustrated by the *Kiliç* case, a state’s positive obligations to prevent violations of the right to life, are not only limited to the adoption of criminal legislation. In *Kiliç*, the ECHR condemned the respondent state (Turkey) for the failure of its authorities to seriously investigate the circumstances surrounding the death of a journalist working for a pro-Kurdish newspaper.¹¹⁰ According to the Court, the negligence of the state authorities undermined the effectiveness of the domestic criminal legislation which aimed at preventing right to life abuses.¹¹¹

Ex ante police action aimed at protection of the right to life consists of another type of positive measures aiming at preventing a violation of the right to life. Although they reach seemingly contradictory conclusions, two ECHR cases—*Osman* and *Mahmut Kaya*—are particularly illustrative of this potential necessity for positive measures and the conditions that guide that necessity. While in the *Osman* case the ECHR held that the failure of the state’s police authorities to prevent an individual’s death did not result in a violation of the right to life,¹¹² in the *Mahmut Kaya* case the ECHR found that the failure of the Turkish authorities to prevent the death of an individual did in fact constitute a breach of the European Convention.¹¹³

108. See *supra* note 90.

109. *Kiliç v. Turkey*, 2000-III Eur. Ct. H.R. 75, 96.

110. *Id.* at 98–100.

111. *Id.* at 99.

112. *Osman v. United Kingdom*, 1998-VIII Eur. Ct. H.R. 3123, 3162–63.

113. *Mahmut Kaya v. Turkey*, 2000-III Eur. Ct. H.R. 149, 181.

While the cases appear inconsistent, the ECHR did in fact apply the same standard in both, and the divergence in results stems from the difference in the nature of the risk to human life present in each case. In the *Osman* case, which concerned the assassination of a person by his son's obsessive former teacher, the Court found that the applicants failed to demonstrate that the police "did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge."¹¹⁴ In contrast, the ECHR in the *Mahmut Kaya* case, which also involved an assassination of an individual (but this time, likely perpetrated by contra-guerilla groups in southern Turkey), the findings of the ECHR led to the conclusion that "in the circumstances of this case[,] the authorities failed to take reasonable measures available to them to prevent a real and immediate risk to the life."¹¹⁵

The juxtaposition of these two cases is important as it aims to stress the fact that positive obligations of states are not limitless. While the limits of positive obligations will be addressed in more detail below,¹¹⁶ it bears mentioning that, whereas in general there are concrete "tools" for assessing the elasticity or legality of the limitations resulting from state interferences in circumstances that implicate negative obligations, such an assessment in cases of due diligence positive obligations is considerably different as it raises the issue of *minimum standards*.¹¹⁷ As mentioned above, the minimum standards for state vigilance in protecting human rights can take shape with a concrete definition only if interpreted in light of the *ad hoc* circumstances of a specific situation. Although international judicial practice has proposed certain criteria to be taken into account when assessing the limits of positive obligations, these criteria are far from being complete and they fail to introduce an overall "mechanism" of interpretation.

2. Social Rights

In contrast to first-generation rights, the origin (or, *terminus a quo*) of social rights is the *status positivus* rationale that requires state authorities

114. *Osman*, 1998-VIII Eur. Ct. H.R. at 3160.

115. *Mahmut Kaya*, 2000-III Eur. Ct. H.R. at 181.

116. See discussion *infra* Part II.C.

117. In fact, these two concepts—"limitations" and "*minimum standards*" of rights—reflect equally the idea of a "narrowed" sphere of protection of a given right. Since the *status negativus* of a norm presumes an obligation to generally abstain from interference, the permissible reduction of its semantic field leads to a limitation. On the contrary, the positive obligations depend upon the condition that the state is in a position to provide the necessary means for protecting human rights. Since the presumption is reversed, the term "*minimum standards*" seems to be more suitable.

to provide (or make available) benefits to individuals that ensure the enjoyment of a certain level of standard of living. Although it shares similarities with the civil rights affirmative obligations stemming from due diligence, the *status positivus* dimension of social rights pursues a different objective and, as such, corresponds to a distinct category of state obligations. While state authorities are expected to actively engage in the protection of human rights in both cases, in the case of civil rights' diligent affirmative conduct, the pursued aim is to prevent a violation of a given right whose enjoyment is threatened not by state acts or omissions, but by a third party (e.g., a private actor) action. On the other hand, positive measures adopted within the framework of the traditional *status positivus* dimension of social rights aim to provide the individual with certain resources, benefits, and/or entitlements to goods or services, which are considered to be vital for the individual's "well-being." However a classic social right obligation can develop beyond its pure *status positivus* dimension and effectively move in the direction of an affirmative due diligence obligation.

As originally conceived, social rights were meant to correspond to rights that were to be realized progressively and to reflect the idea of a welfare state.¹¹⁸ Accordingly, while social rights have been "shielded" with the binding force of a norm, they also have been provided with a mechanism for "disarmament." Considering the progressive nature of

118. In the terms of the International Covenant on Economic, Social and Cultural Rights (ICESCR), each state agrees to take steps "to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." Office of the High Commissioner for Human Rights, *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A (XXI), Article 2(1), available at <http://www2.ohchr.org/english/law/pdf/cescr.pdf>. According to U.N. Commission on Economic, Social and Cultural Rights (the "CESCR"),

[t]he concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. . . . Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. . . . the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.

Comm. on Econ., Soc. and Cultural Rights [CESCR], *General Comment No. 3 – The Nature of States Parties Obligations* (Art. 2, par. 1), ¶ 9, U.N. Doc. E/C.12/1990 (Dec. 14, 1990)

social rights, it is important to point out that there is a fine line between declarative manifestation of good intentions and judicially enforced rights. This dividing line separates pure social policy,¹¹⁹ which depends on the will and priorities of a given government (as well as, of course, the applicable political model or the ideology),¹²⁰ from the concept of a judicially protected *minimum* "*acquis social*." Assuming *arguendo* that there exists a "core" *acquis social*, whose undermining engages, in legal terms, the responsibility of state authorities at the international level, the problems remains that the *minimum* standards of that *acquis* are far from being objective and universally recognized.¹²¹ Rather, the minimum

119. See, e.g., *Chapman v. United Kingdom*, 2001-I Eur. Ct. H.R. 41.

It is important to recall that Article 8 does not in terms recognise a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. While it is clearly desirable that every human being have a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision.

Id. at 73.

120. As the United Nations' Committee on Economic, Social and Cultural Rights [CESCR] noted,

in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or *laissez-faire* economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems.

General Comment No. 3, *supra* note 119, at ¶ 8. Nonetheless, no one can deny that the political and economic system adopted by a polity has a strong impact on the nature, extent, and effectiveness of its welfare services. Regarding the political philosophy dimensions of the issue, see, for example, Sandra Fredman, *Human Rights Transformed: Positive Duties and Positive Rights*, 2006 PUB. L. 498, 505–508 (2006).

121. In one of its general comments, the CESCR interprets the ICESCR in a way that introduces *minimum* standards.

Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*.

General Comment No. 3, *supra* note 119, at ¶ 10. Nonetheless, the extent of these *minimum* standards depends upon the means of which a state disposes.

standards would depend upon the state's level of development and the means at the state's disposal. As such, those minimum standards are likely to diverge from one national legal order to another.

The classic question of the extent of justiciability of social rights has led to a search for alternative legal bases that can, to a certain degree, accommodate the aims of social rights indirectly.¹²² At the international level, this trend was reinforced by the absence of mechanisms for the protection of social rights accessible by the individual that would be as effective as those existing at the regional and global levels for the enforcement of civil rights. The justiciability of a given right—even through an alternative civil right legal “etiquette”—is closely connected with effective implementation of that right. Accordingly, within certain limits, this “contrivance” has proven in a number of cases to be successful and has resulted in first-generation norms acquiring, besides their original “genuine” civil or political content, a new “pseudo-social” application.¹²³

While, as a result of being read under the “magnifying lenses” of effectiveness, this interpretation manages to cover objectives that fall mainly within the field of classic social rights, what remains certain is the fact

By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps “to the maximum of its available resources.” In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

Id.

122. The ECHR has explicitly recognized the plurality of pertinent legal bases for accommodating one and the same situation. In its own words:

The Court is aware that the further realisation of social and economic rights is largely dependent on the situation—notably financial—reigning in the State in question. . . . Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers . . . that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.

Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A) at 14–15 (1979).

123. Undoubtedly, this was the product of what the international judge aimed for every time that he or she proceeded with an expansive interpretation and, thereby, allowed the sphere of the civil right norm that was invoked by the applicant to be broadened.

that such “genetic modification” of the “DNA” of the “alternative” civil right legal basis could not be effected unless its actual “nature” allowed this to occur. The schematization of the relationship between the mainstream and the alternative legal basis may be aptly illustrated by the tracing of two homocentric circles, where the narrower circle corresponds to the alternative norm and the broader circle to the mainstream legal basis. If, for any reason, the mainstream norm fails to produce a satisfactory effect, the enlargement of the narrower circle may allow for the coverage of certain situations that were originally envisaged as falling into the broader circle. However, the *conditio sine qua non* for such an enlargement of the alternative norm circle is that both circles are homocentric (i.e., they share a common semantic center *ratione materiae*). Accordingly, the core of the two norms, if not identical, must at least be sufficiently similar to accommodate contiguous factual situations. For example, it is possible that the right to health may, under certain conditions, be appropriately accommodated under the right to life.

However, there are consequences to such a shift. With respect to the right to life, the social, *status positivus* dimension of that right, which, in its *lato sensu* conception requires the state to progressively build up the necessary apparatus to protect the health and life of its citizens, effectively relinquishes its place to the actionable obligation of diligence under the legal basis of civil right to life. This, in turn, limits the obligations of the state authorities to providing to the patient the means available at that specific point in time. Accordingly, if the right to health is to be conceived *stricto sensu*, the affirmative conduct in light of due diligence is absolutely identical in both its social and civil right legal bases.

The *Botta* case, which involved the right to private life being invoked before the ECHR as the alternative available legal basis for protecting a right that is social in its substance, provides a good example of the homocentric circle illustration.¹²⁴ The *Botta* applicant, a person with physical disability, alleged a violation of Article 8 of the European Convention due to the difficulties in accessing the beach and sea while vacationing.¹²⁵ Interestingly, the situation described in his application had both a “general” affirmative dimension, as well as, an indirect horizontal dimension, because the applicant was prevented from accessing both public and private beaches.¹²⁶ However, the *Botta* Court declined to enlarge the sphere of the civil right to private life protected by the European

124. *Botta v. Italy*, 1998-I Eur. Ct. H.R. 412.

125. *Id.* at 416–20.

126. *Id.* at 416. Private beaches are required, under domestic law, to be equipped with necessary facilities for persons with disabilities. *Id.*

Convention to such an extent that it would cover the allegations of the applicant, noting that

the right to gain access to the beach and the sea at a place distant from [the applicant's] normal place of residence during his holidays, concerns interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the measures the state was urged to take in order to make good the omissions of the private bathing establishments and the applicant's private life.¹²⁷

The Court effectively avoided drawing a distinction between access to private and public beaches, which are differentiated mainly on the basis of the standard of conduct that would suffice for ensuring the enjoyment of the right by the applicant.¹²⁸ Whereas construction of the necessary facilities on public beaches falls into the broader scope of progressive realization of social rights, the indirect horizontal dimension would be satisfied by state implementation of national legislation imposing a requirement on private beaches to facilitate access to persons with disability. The adoption of such domestic legislation would constitute a preventive positive measure that clearly falls within the concept of due diligence.

The ECHR clarified its position with respect to the general affirmative dimension of social rights under a civil "labeling" in the *Sentges* case.¹²⁹ The applicant in *Sentges*, an individual suffering from progressive muscle degeneration, brought a right to private life claim against the state after state authorities rejected his request for a robotic arm, which would reduce his dependency on third persons. In deciding against the applicant, the ECHR, after referring to the conditions according to which affirmative conduct is envisaged under the right to private life, emphasized

127. *Id.* at 423; see also *Zehnalová and Zehnal v. Czech Republic*, 2002-V Eur. Ct. H.R. 336. There, the Court declared as inadmissible the allegations of the applicants, who were claiming a violation of Article 8 of the European Convention on Human Rights due to the lack of disability options in buildings providing public services. *Id.* at 347–53. According to the Court, the link between private life and the affirmative conduct required by the state must be direct and immediate. As the Court explained,

Its task is to determine the limits to the applicability of Article 8 and the boundary between the rights set forth in the Convention and the social rights guaranteed by the European Social Charter. . . . However, the sphere of State intervention and the evolutive concept of private life do not always coincide with the more limited scope of the State's positive obligations.

Id. at 351–52.

128. *Botta*, 1998-I Eur. Ct. H.R. at 420–24.

129. *Sentges v. Netherlands*, App. No. 27677/02, Eur. Ct. H.R. (July 8, 2003), available at <http://www.echr.coe.int/eng>.

the discretion accorded by the European Convention to states where a given situation involves “an assessment of the priorities in the context of the allocation of limited state resources.”¹³⁰ It arguably follows then, that the general affirmative dimension of a given right is, in its “core” conception, limited, and does not extend to such a degree as to transform into a pure *status positivus* social entitlement.

In a particularly pertinent case, the African Commission on Human and Peoples Rights (“ACHPR”) discussed the indirect horizontal dimension of social rights.¹³¹ The case involved the potential state imposition of affirmative measures against a multinational corporation, which, according to the allegation, formed an oil consortium with the state oil company and exploited oil reserves in Nigeria with detrimental consequences for the environment, as well as, for the health of the local population.¹³² Finding multiple violations of Nigeria’s international human rights obligations, the ACHPR noted that the respondent state “has given the green light to private actors . . . to devastatingly affect the well-being of the Ogonis,” the local population.¹³³ With respect to the right to food, the ACHPR declared that this right “is implicit in the African Charter, in such provisions as the right to life, the right to health and the right to economic, social and cultural development.”¹³⁴ Furthermore, the Commission stated,

The African Charter and international law require[s] and bind[s] Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens. Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy

130. *Sentges v. Netherlands*, App. No. 27677/02 (July 8, 2003), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Sentges&sessionid=42116821&skin=hudoc-en>; see also Olivier De Schutter, *Reasonable Accommodations and Positive Obligations in the European Convention on Human Rights*, in *DISABILITY RIGHTS IN EUROPE: FROM THEORY TO PRACTICE* 35, 42 (Anna Lawson & Caroline Gooding eds., 2005) (referring to the problem of “polycentricity”—i.e., the unavoidable social side-effects that the adjudication of such type of social remedies will have for the interests of other social groups equally needing to benefit from limited state resources).

131. *Soc. & Econ. Rights Action Ctr. and Ctr. for Soc. and Econ. Rights v. Nigeria*, Comm’n No. 155/96, (Afr. Comm’n of Human & Peoples’ Rts., Oct. 27, 2001), available at http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=404115.

132. *Id.* ¶ 1–9.

133. *Id.* ¶ 58.

134. *Id.* ¶ 64 (internal citations omitted).

or contaminate food sources, and prevent peoples' efforts to feed themselves.¹³⁵

In concluding, the ACHPR held that the respondent state breached its right to food obligation because it "allowed private oil companies to destroy food sources."¹³⁶

The *Powell and Rayner* case provides another example concerning the indirect horizontal dimension of essentially social rights.¹³⁷ In that case, the ECHR was asked to decide whether sonar pollution produced by the Heathrow airport amounted to an infringement of the right of the applicants to the respect of their private life and home protected by Article 8 of the European Convention.¹³⁸ The Court held that Article 8 applied to the applicants, as the quality of their private lives and the possibility for them to enjoy the amenities of their respective homes had been affected.¹³⁹ Because the airport had been privatized, the question raised was whether the Court should examine the alleged violation under the *status negativus* or under the affirmative (due diligence) dimension of the right to respect of private life and home. According to the Court,

Whether the present case be analyzed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of article 8 or in terms of an "interference by a public authority" to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.¹⁴⁰

After proceeding with the proportionality test,¹⁴¹ the ECHR concluded that, given the importance of the airport to the public interest and the positive measures adopted by the respondent government (such as re-

135. *Id.* ¶ 65.

136. *Id.* ¶ 66.

137. *Powell and Rayner v. United Kingdom*, 172 Eur. Ct. H.R. (ser. A) 1 (1990).

138. *Id.* at 7–13.

139. *Id.* at 18.

140. *Id.*

141. On the issue of proportionality, see discussion *infra* Part II.C. The same proportionality test was applied in a similar case of *López Ostra*. *López Ostra v. Spain*, App. No. 16798/90, Eur. Ct. H.R., at 15–16, available at <http://www.echr.coe.int/eng>. There, the applicant was protesting, on the basis of Article 8 of the European Convention, against emission of noxious gases by a private tannery waste reprocessing plant that was constructed next to the applicant's house. *Id.* ¶ 7–9.

strictions on night flights and aircraft noise monitoring), there was no violation of the rights of the applicants.¹⁴²

With respect to the right to work, the International Covenant on Economic, Social and Cultural Rights ("ICESCR") noted that "[t]he obligation to protect the right to work includes the responsibility of States parties to prohibit forced or compulsory labor by non-State actors."¹⁴³ Interestingly, an equivalent obligation is imposed on states on the basis of the civil right that prohibits forced labor or servitude. Utilizing this legal "etiquette," the applicant in the *Siliadin* case, a female minor unlawfully present in a foreign country, brought her case before the ECHR claiming a violation of the European Convention due to the failure of the respondent state to protect her from her employers, who were forcing her to work without pay for more than fifteen hours per day.¹⁴⁴ The ECHR reviewed the quality of domestic legislation criminalizing behaviors like the one to which the applicant was subjected, and concluded that the existing legislation did not deal specifically with the right guaranteed by the European Convention and therefore failed to provide effective penalties.¹⁴⁵ Consequently, the Court held that the respondent state failed to comply with its obligation to punish the breach of a specific expression of the right to work by third-party individuals.¹⁴⁶

Finally, it bears noting that social rights include negative aspects as well as their original *status positivus* dimension.¹⁴⁷ However, the effect of social rights vis-à-vis diligent affirmative behavior should be distinguished from their mainstream *status positivus* dimension. Additionally, it should be noted that, to the extent diligence is developed against a "general" situation (excluding the conduct of a third-party individual), the notion that diligent conduct and the broader *status positivus* are identical is limited only to the core field of the norm. By contrast, the *status positivus* dimension of a social right extends beyond the obligation of demonstrating simple diligence and moves in the direction of a progressive fulfillment. Despite the problem of justiciability, the pure *status positivus* sphere of a social right norm requires the progressive realization

142. Powell and Rayner v. United Kingdom, 172 Eur. Ct. H.R. (ser. A) at 7–13.

143. Comm. on Econ., Soc. and Cultural Rights [CESCR], *General Comment No. 18 – The Right to Work*, ¶ 25, U.N. Doc. E/C.12/GC/18 (Nov. 24, 2005).

144. *Siliadin v. France*, 2005-VII Eur. Ct. H.R. 333, 340–47.

145. *Id.* at 372–73.

146. *Id.* at 373.

147. See, e.g., Comm. on Econ., Soc. and Cultural Rights [CESCR], *General Comment No. 15 – The Right to Water*, ¶ 10, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

of its objectives.¹⁴⁸ Accordingly, a social right norm, without excluding the prevention and punishment of situations threatening its enjoyment (the due diligence aspect), aspires to create the ideal circumstances under which the right to an entitlement can become equally accessible to all members of a given society.¹⁴⁹ Additionally, as far as the indirect horizontal dimension (under due diligence) of a social right is concerned, its nature, function, and logic are similar in both civil and social rights.¹⁵⁰

Having concluded with the presentation of the effect that due diligence has over civil and social rights, at this point, it is helpful to examine the limits of the scheme presented thus far in this Article.

C. Limits on the Primary Obligations of the "Home" State

As explained above, the due diligence principle is merely a vehicle. In order to express or impose a more concrete duty, that vehicle must be fitted with a separate substantive international legal norm (a "protected right"). This two-layer configuration results in limits to a given application of the principle potentially arising at two separate levels. This section considers the limits inherent at both levels, as well as potential limits arising, more specifically, from the rights of investors.

1. Limits Inherent to the Due Diligence Principle

At the macro level of the due diligence principle, states are expected, pursuant to their "duty to protect," to make every possible effort toward affirmative action. Nonetheless, states are not expected to guarantee a given result,¹⁵¹ but rather to merely demonstrate their best efforts in light of the means available to them.¹⁵² Thus, in domestic law, a distinction is drawn between "obligations of result" and "obligations of means."¹⁵³

148. Although it is relatively easy to identify where the obligation begins, it is impossible to know where it ends. Therefore, it is difficult to define the "distance" separating the obligations stemming from due diligence with the broader mainstream *status positivus* effect of social rights.

149. Corresponding to the obligation to fulfill a social right, the concept is distinguished in the scholarship from the obligation to protect (diligence).

150. As the case law presented so far suggests, under due diligence, states are expected to effectively prevent and punish any threat to the enjoyment caused by third-party individuals of both civil and social rights.

151. Crawford, *supra* note 47, at 140.

152. Pierre-Marie Dupuy, *Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10 EUR. J. INT'L L. 371, 378–382 (1999); see also Pisillo-Mazzeschi, *supra* note 80, at 46–49.

153. Concerning the origins of the classification and its sources in French civil law, see Jean Combacau, *Obligations de résultat et obligations de comportement. Quelques ques-*

"Obligations of result" require states to guarantee that a given result is in accordance with the norms that oblige them to either act or refrain from acting in the first place. Where a state fails to obtain such a result, the obligation is broken and, consequently, the state's conduct becomes wrongful, regardless of the circumstances under which the failure occurred. By contrast, "obligations of means" merely require that the responsible subject demonstrate each and every possible effort to achieve the desired result. If the result is never reached, the responsibility of the state will only be questioned insofar as the state must prove that it employed all the means reasonably available to it in attempting to obtain the desired result.

The classification of the obligations of due diligence as "obligations of means"¹⁵⁴ stems from the simple reality that results pursued via diligent conduct will frequently hinge on factors beyond the scope of a state's will (i.e., beyond its control). Although a state might make use of all the means at its disposal, other factors or circumstances may intervene and decisively impact the final outcome. Accordingly, predictability and effectiveness in state control over a given situation are considered two of the most essential factors in evaluating diligent state conduct. However, the term "evaluation" implies the existence of a certain degree of subjectivity in the assessment of state actions and omissions. While a state's breach of a *negative* duty to abstain from wrongfulness imposes an objective responsibility upon the state, a *positive* duty of diligent affirmative action triggers a subjective evaluation¹⁵⁵ of the conduct to be expected in light of the given conditions and the extent of the available means. Appropriately, all such situations are to be considered in light of the specific content of the applicable substantive norm. It follows that state responsibility for lack of due diligence will occur only when the specific circumstances would have called for a better use of the means at

tions et pas de réponse [Result and Conduct Oriented Obligations: A Few Questions without an Answer], in MÉLANGES OFFERTS À PAUL REUTER. LE DROIT INTERNATIONAL: UNITÉ ET DIVERSITÉ 181, 194–204 (D. Bardonnet et al. eds., 1981).

154. In reality, the two terms—"obligation of means" and "obligation of diligent conduct"—are synonymous and are used in legal scholarship interchangeably both at national and international level. See André Tunk, *La Distinction des Obligations de Résultat et des Obligations de Diligence*, 1945 LA SEMAINE JURIDIQUE (JURIS-CLASSEUR PÉRIODIQUE) 449.

155. See Pierre M. Dupuy, *Le Fait Générateur de la Responsabilité Internationale des États*, 188 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 21, 102–03 (1984) (noting that although "objective" international responsibility is the rule, a "subjective" state fault might be taken into consideration when the primary obligation is to set a goal to be achieved); Pisillo-Mazzeschi, *supra* note 80, at 18–21, 49–50 (citing various other authority).

the state's disposal. As such, there is significant space left for a subjective evaluation of the state's "fault."

Still, if international responsibility for failure to satisfy a due diligence standard is dependent upon a subjective appreciation of the specifics circumstances of a particular case, it is arguable that some minimum standards must also be set, so as to provide a broad threshold for state action in such instances. Defining these standards, however, may be easier said than done. For instance, such minimum due diligence standards ought to be low enough that they would be attainable by all states, without regard to a state's economic resources. Otherwise, one would still need to perform a subjective inquiry into the extent that a use of resources was legitimately too burdensome for a state. Such an inquiry would require an informal categorization of states with respect to level of development, and even then, states would still have to be bound only in relation to certain common or usual factual circumstances. In practice, the minimum standards of diligence are far from objective in absolute terms, rather they are multiple and flexible. This applies equally to all categories of norms that may rely on diligence practices, including human rights. Even fundamental rights, whose *status negativus* effect is universally accepted, are barely susceptible to a standardized minimum of protection common to all states under due diligence. This is because a government need only prove that the adoption of the positive measures that are necessary under due diligence is beyond its capacities.

2. Limits Inherent to the "Protected Right"

At the micro level, both civil and social rights are equally able to produce their results in regard to the principle of due diligence. Affirmative action, originating from the generic obligation of due diligence, is distinguishable from both the *status negativus* and the mainstream *status positivus* effect given to a human rights norm. Although the *status positivus* dimension of a social right norm shares a common point of departure with the affirmative action adopted against a general situation¹⁵⁶ under that very same norm, it is the actual standard of due diligence that sets the limits of the affirmative conduct. Therefore, it is the due diligence standard that renders the affirmative action standard discernable from the broader sphere of the *status positivus* effect. Thus, the *status positivus* effect can extend further towards an unlimited progressive fulfillment of the objectives of the social norm. The desirable result in terms of diligence is present in cases of both first and second generation human rights

156. That is to say, it does not result in an indirect horizontal effect as against a threat caused by a third-party individual.

and is parallel to that of the *status negativus* effect of a norm. Nonetheless, the main difference between the *status negativus* dimension and due diligence is that the effect that states are obliged to guarantee through abstention from interference reflects an obligation of result, while, in the case of affirmative measures of due diligence, the obligation for national authorities is limited to their capacities.

In order for a court to assess whether a state has fulfilled its obligations of due diligence in a given situation, the court must first define what type of affirmative action was necessary given the nature of the circumstances. However, as a threshold matter, the court must examine whether the situation experienced by the victim, as well as the victim's expectations for benefitting from affirmative action, fall into a right guaranteed by the body of positive international law.¹⁵⁷ With respect to this analysis, the passage from negative to positive obligations is facilitated by the "object and purpose" method of interpretation, aiming to extend the effect of a norm to its full *effet utile* (or "practical effectiveness"). Nonetheless, the *effet utile* method is just one among several others available to an adjudicator and nothing prohibits the choice of another technique of interpretation.

For example, in the *Pretty* case, the applicant, an individual suffering from a progressive neuro-degenerative disease resulting in general paralysis, applied to the state authorities for the granting of a positive measure—permission for her husband to assist her in committing suicide.¹⁵⁸ Invoking the right to life provided in the European Convention, the applicant argued that the right also included the right to choose whether or not to go on living.¹⁵⁹ The ECHR, in concluding that the refusal of the national authorities to give this permission did not breach their positive obligations stemming from the European Convention, proceeded with a grammatical reasoning¹⁶⁰ focusing on the textual analysis of the norm. According to the Court, the right to life "cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die."¹⁶¹ The applicant's counterargument, that such assistance to suicide is permitted in the national legal order of other coun-

157. See *supra* Part II.B (particularly case law presented therein).

158. *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 155, 162–63.

159. *Id.* at 184–85.

160. This is an interpretative technique that is strongly related to the one focusing on the will/intention of the contracting parties—a diametrically opposite technique to that of *effet utile*. See *Johnston v. Ireland*, 112 Eur. Ct. H.R. (ser. A) 24–25 (1986) (where the ECHR concluded that the Convention does not guarantee the right to divorce, since this was deliberately omitted by the wording of article 12, establishing the right to marriage).

161. *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. at 186.

tries, prompted the Court to use another interpretative technique: the margin of appreciation.¹⁶² Under this method, states have the right to define a concept of the ECHR at the national level in accordance with the legal traditions particular to their domestic legal order. Thus, the court reasoned that

even if circumstances prevailing in a particular country which permitted assisted suicide were found not to infringe Article 2 of the Convention, that would not assist the applicant in this case, where the very different proposition - that the United Kingdom would be in breach of its obligations under article 2 if it did not allow assisted suicide - has not been established.¹⁶³

In short, the Court found that, while the right to life does not guarantee the adoption of positive measures enabling euthanasia, the right does not prohibit it either which effectively left the issue up to the states.

Once it has been established that a situation is covered by the semantic field of a particular right, the extent of the state obligation for affirmative conduct will then have to be identified. This might properly be seen as the process of defining the standard introduced by the human rights norm as it relates to the nature of the risk and the particular circumstances of a case.

In its *Osman* judgment, the ECHR enunciated a set of criteria for judging the adequacy of a state's preventive positive measures. These criteria include the unpredictability of human conduct, the knowledge of the risk,

162. Generally, the ECHR is reluctant to recognize the existence of positive obligations for states where there is an absence of *consensus* reflected by common "principles" over an issue at the national level. Nonetheless, nothing prohibits a judge from diagnosing the existence of common obligations for affirmative conduct even in the absence of such a *consensus*. Compare *Rees v. United Kingdom*, 106 Eur. Ct. H.R. 1 (1986), with *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 1. The *Rees v. United Kingdom* case concerned the question of whether the respondent state was obligated to adopt positive measures in order to confer on the applicant, a transsexual, a legal *status* corresponding to his actual condition. The ECHR recognized that, in the absence of *consensus*, states enjoy a margin of appreciation to regulate this type of situation at the domestic level. *Rees*, 106 Eur. Ct. H.R. at 15. By contrast, in *Goodwin v. United Kingdom*, the ECHR employed, despite the absence of a *consensus* at the European level, a dynamic/evolutive interpretation and noted that

the Court . . . attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.

Goodwin, 2002-VI Eur. Ct. H.R. at 29–30.

163. *Pretty*, 2002-III Eur. Ct. H.R. at 187.

the operational choices, which must be made by the national authorities in terms of priorities and resources, the possibility for the authorities to provide the necessary measures, as well as the need for proportionality.¹⁶⁴ Obviously, this approach fails to offer a unitary pathway for interpretation. Instead, it seeks to determine the existence of a state's affirmative obligation by depending on several heterogeneous criteria, which do not present the systemic interconnectedness that is necessary for qualifying it as an overall mechanism of interpretation. However, the criteria may serve a limited purpose as a set of tools a judge may choose to employ according to the exigencies of the particular case at hand. In this view, judges enjoy discretion in both their choice of the applicable criteria, as well as their subjective evaluation of the facts of the particular case. These criteria, then, might be used in a cumulative manner towards an overall evaluation of the reasonableness of the expectations that a citizen has for state affirmative conduct.

In contrast to the aforementioned criteria, which should be applied only when the particular circumstances justify it, the classic proportionality test is more consistently relevant to the due diligence analysis. In the field of human rights, the traditional function of the proportionality test is to evaluate the necessity and reasonableness of state interference with the

164. *Osman v. United Kingdom*, 1998-VIII Eur. Ct. H.R. 3123, 3159–60; see also Benedetto Conforti, *Exploring the Strasbourg Case-Law: Reflections on State Responsibility for the Breach of Positive Obligations*, in ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 129, 132 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004). Conforti introduces the idea of the foreseeability of the risk/threat to the right and notes that the “specification of the test of foreseeability” is the “causality test,” applied to demonstrate the existence of a causal link connecting the risk/threat of the right with the facts/situation constituting its source. Conforti, *supra*, at 132; see, e.g., *Mastromatteo v. Italy*, 2002-VIII Eur. Ct. H.R. 151; *L.C.B. v. United Kingdom*, 1998-III Eur. Ct. H.R. 1390. In *L.C.B. v. United Kingdom*, the ECHR refused to accept that a causal link existed between leukemia suffered by the applicant and the exposure of her father to radiation when he was a serviceman in an area where nuclear tests were conducted by the respondent state. *L.C.B.*, 1998-III Eur. Ct. H.R. at 1404. The ECHR noted that in the absence of scientific proof, the way to subjective appreciation is wide open. *Id.* In the *Mastromatteo v. Italy* case, the applicant argued before the ECHR that the Italian authorities breached the right to life of his son because they failed to prevent his death, which occurred when a group of criminals, who had been granted prison leave, co-opted his car in an attempt to escape after a bank robbery. The Court applied the foreseeability test and concluded that the death of the applicant's son was the “result of the chance sequence of events” and that there was nothing in the circumstances of the particular case to alert the national authorities “to the need to take additional measures.” *Mastromatteo*, 2002-VIII Eur. Ct. H.R. at 168. Or, as the respondent state claimed, “the causal link was tenuous . . . given the circumstances in which the victim died, namely, following a long series of coincidences and, therefore, fortuitous, unforeseen and unforeseeable incidents.” *Mastromatteo*, 2002-VIII Eur. Ct. H.R. at 164–65.

rights of an individual so that a suitable equilibrium between the general interest and the individual rights can be maintained. Although the ECHR has held that the criteria within the European Convention used to justify the limitation of a given right in its negative dimension cannot be applied to affirmative obligations in the same way,¹⁶⁵ the Court has also noted that the search for a fair balance between community and individual interests is "inherent in the whole Convention."¹⁶⁶ Therefore, as long as the required affirmative action raises issues of conflict between individual and general interests, the principle of proportionality becomes applicable in order to evaluate the purpose of the positive measures and to assess whether their adoption is necessary and reasonable.

For example, in *Rees v. United Kingdom*, the Court applied the proportionality test in deciding whether the respondent state had an obligation to adopt positive measures to guarantee secrecy concerning the original gender of the applicant, who was transsexual.¹⁶⁷ After discussing the margin of appreciation recognized by various national authorities, the Court concluded that third parties, including public authorities, maintained a legitimate interest in receiving such information, and, therefore, the personal right claimed by the applicant could not extend so broadly.¹⁶⁸

Almost twenty years later, in the *Christine Goodwin* case, the Court once again applied the proportionality test in order to investigate the balance that should be maintained between the right of a transsexual person to legally recognize his or her gender change and the general interest.¹⁶⁹ On this occasion, the Court examined the latter interest from the perspective of the burden that it would cause for the birth register system, the detriment that third parties might suffer in being unable to access the original entries, and the complications that would occur in the fields of family law, succession law, and social security. Interestingly, the Court found the right of the applicant to live in "dignity and worth in accordance with the sexual identity" choice was not of "concrete or substantial hardship or detriment to the public interest."¹⁷⁰ Consequently, the Court

165. *Rees*, 106 Eur. Ct. H.R. at 15. For a critique, see Sudre, *supra* note 92, 1373–74.

166. *Rees*, 106 Eur. Ct. H.R. at 15; see also Powell and Rayner v. U.K., 172 Eur. Ct. H.R. (ser. A) 18 (1990); López Ostra v. Spain, App. No. 16798/90, Eur. Ct. H.R., at 15, available at <http://www.echr.coe.int/eng> (where the Court stated that "the applicable principles are broadly similar" in both the affirmative and the negative dimensions of a right).

167. *Rees*, 106 Eur. Ct. H.R. at 15.

168. *Rees*, 106 Eur. Ct. H.R. at 18.

169. *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 1, 31–32.

170. *Id.*

departed from its previous case law and concluded that the respondent state breached its obligation to protect the applicant's right to private life.¹⁷¹

The conclusions a court reaches regarding the extent of positive state obligations will undergo one last test, carried out at the macro, or generic, level of the due diligence principle. The baseline for this test is that the state has at its disposal the necessary means for providing the measures that have been considered reasonable in a given case.¹⁷² Where a state possesses several equally useful means to satisfy the standard of diligence identified in a given situation, the recognized margin of discretion may be considered and effectively allows the state authorities the discretionary power to choose freely among the various available means.¹⁷³

3. Balancing Human Rights with the (Human) Rights of the Investor

Human rights are not intended solely to protect local populations from the wrongful conduct of investors; rather, human rights call for the equal protection of each and every individual. As subjects under international law, investors are entitled to general human rights protection,¹⁷⁴ as well as the protection of those rights that are specific to the identity or role of "investor."¹⁷⁵ Therefore, it is possible that states, in their effort to protect

171. *Id.* at 32. The *Goodwin* case suggests that state fault for failing to demonstrate diligence is far from inter-temporal or location-blind, and may instead arise as the subjective product of societal *momentum*.

172. Alland, *supra* note 91, 24.

173. Plattform "Ärzte für das Leben", 139 Eur. Ct. H.R. (ser. A) at 12 (1988); *see also* Spielmann, *supra* note 102, at 141; Sudre, *supra* note 92, at 1370.

174. More importantly, rights of investors extend to protection of property and access to justice.

175. The debate over the question of whether trade or investment rights equate to human rights has in the past been extremely animated. One can recall, for instance, the keen dialogue between E.U. Petersmann and Ph. Alston. *See* Ernst-Ulrich Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. INT'L L. 621, 621-650 (2002); Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT'L L. 815, 815-844 (2002); Ernst-Ulrich Petersmann, *Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston*, 13 EUR. J. INT'L L. 845, 845-851 (2002). According to Alston, economic liberties, such as investors' rights, should not be equated to human rights as their purpose is fundamentally different. As he claims, "trade-related rights are granted to individuals for instrumentalist reasons." Alston, *supra*, at 826. Robert Howse has also contributed to the above-mentioned dialogue. *See* Robert Howse, *Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann*, 13 EUR. J. INT'L L. 651, 651-659 (2002). Also, José E. Alvarez, with his humouristic spirit, described the

the human rights of the local population through affirmative conduct, may end up interfering with the rights of the investor.¹⁷⁶ Concomitantly, there is the possibility that a state, by neglecting to interfere with the human rights of the investor, may breach its due diligence obligation to protect the human rights of the local population.¹⁷⁷

While there may appear to be a conflict of rights upon first glance, it should be understood that a true normative conflict—i.e., a conflict *per se*—between the fundamental human rights is highly unlikely to occur.¹⁷⁸ The term “conflict” is quite often used improperly, particularly when used to describe situations raising issues of “priority” in protection. In

NAFTA investment chapter as “a human rights treaty for a special-interest group.” José E. Alvarez, *Critical Theory and the North American Free Trade Agreement's Chapter Eleven*, 28 U. MIAMI INTER-AM. L. REV. 303, 308 (1996); *see also* Biloune and Marine Drive Complex LTD v. Ghana, 95 I.L.R. 183, 203 (UNCITRAL Arbitration, 1994). There, the investor complained, *inter alia*, about his arbitrary arrest and deportation. According to the tribunal, “contemporary international law recognizes that all individuals, regardless of nationality, are entitled to fundamental human rights.” *Id.* However, the tribunal concluded that the investor’s claim fell outside its jurisdiction, which was limited to commercial issues. As was explained, “while the acts alleged to violate the international human rights of Mr Biloune may be relevant in considering the investment dispute under arbitration, this Tribunal lacks jurisdiction to address, as an independent cause of action, a claim of violation of human rights.” *Id.*

176. In their *status negativus* dimension.

177. The state will breach its obligation in the indirect horizontal dimension.

178. However, it is possible that a question of priorities in the protection of conflicting human rights arises. Taking into account the context and the *ad hoc* circumstances of the case, the role of proportionality is to set these priorities. Of course, a normative conflict may well arise between human rights and the specific investment rights of the investor. Law offers a number of well-known techniques applicable in the case of a conflict of norms, including hierarchy. If a given human right is susceptible to derogations, then these might also be justified on the basis of the legitimate aim of the protection of the investment rights of the investor. In that case, proportionality comes into play again in order to balance the human rights of the local population with the investment rights to which a corporation is entitled. Due to the *erga omnes* nature of human rights, the investor’s rights may produce their effect only to the extent that they will not disproportionately impede the effectiveness of human rights. This is provided, of course, that a given right has not acquired the *status of jus cogens* in which case, no limitations are permitted. *See* Ursula Kriebaum, *Privatizing Human Rights: The Interface between International Investment Protection and Human Rights*, in *THE LAW OF INTERNATIONAL RELATIONS - LIBER AMICORUM HANSPETER NEUHOLD* 165, 168–72 (August Reinisch & Ursula Kriebaum eds., 2007) (examining various scenarios of potential conflict between the rights of the investor and human rights, with an emphasis on social rights and on the right to water); Yannick Radi, *The Place of Human Rights in Investment Treaty Arbitration? Making Use of the International Investment Law ‘Tool-Box’* (on file with author) (describing how proportionality functions in the frame of the fair and equitable treatment standard in international investments).

other words, while the obligations stemming from two different human rights norms are not in conflict with each other in the abstract, a conflict might arise in situations like the one examined here, where different rights are owed to two different subjects and the effective protection of one's rights requires a limitation on the rights of the other. In such a case, the question becomes—to what extent should derogations of protection be allowed?¹⁷⁹

As argued above, proportionality is the most valuable instrument available in testing the legality of derogations. Under the principle of proportionality, the necessity of a state's behavior in both its negative and affirmative dimensions is evaluated by balancing the relevant human rights against the general societal interest. Accordingly, under a proportionality evaluation, when a claimant alleges that state authorities negligently failed to implement positive measures to protect him or her from human rights abuses perpetrated by a corporation, the necessity of the adoption of such affirmative conduct is examined as it relates to the general interest of the society. The general societal interest implicitly and indirectly includes respect for the rights of the corporation, which is a vital engine for social and economic growth and development.¹⁸⁰ Similarly, if the investor complains about his or her (both human and investor) rights, the proportionality test will enable the judge to evaluate the nature and the gravity of the state's interference with the investor's rights in comparison to the general interest that the interference allegedly aims to protect.¹⁸¹ Here, in turn, the general interest includes ensuring respect of the human rights of the local population.

Except for *jus cogens* norms, human rights norms are susceptible to limitations. Proportionality allows for the *ad hoc* setting of priorities, as it outlines the limits of governmental discretion in: providing freedoms, incentives, and prerogatives to the investor; regulating investment activities; and, more broadly, shaping economic policy. However, liberty or discretion in policy-making for governments is automatically excluded if the policy is found to interfere disproportionately with human rights. Such a balanced approach to this type of dispute allows human rights

179. Provided, of course, that a derogation of a protection is even allowed. In the case of the few human rights that enjoy a *jus cogens* status, no derogation is permitted.

180. See, e.g., *Powell and Rayner v. United Kingdom*, 172 Eur. Ct. H.R. (ser. A) 18–20.

181. In the case of expropriation, the proportionality test will come into play in the frame of the ECHR in order to assess the amount of compensation. Accordingly, full compensation is not always guaranteed. See Matthias Ruffert, *The Protection of Foreign Direct Investment by the European Convention on Human Rights*, 43 GERMAN Y.B. OF INT'L LAW 116 (2000).

concerns to co-exist with financial interests, while providing a reasonable framework for settling legitimate conflicts when they actually arise.

III. TAKING DUE DILIGENCE BEYOND TERRITORIALITY

It goes without saying that the responsibility to prevent and deter a corporation from perpetrating human rights abuses belongs, first and foremost, with the state that hosts the corporation—that is, the state exercising sovereign jurisdiction over the land where the corporation is operating and where the abuses occur. However, there are two rationales for highlighting the parallel obligations that the corporate investor's state of origin bears. First, host states are often developing countries; even if authorities in such states are sensitive to human rights, either their protective efforts are ineffective¹⁸² or they are prone to prioritizing the economic benefits that corporate activities create and disregarding human rights abuses. Second, from a moral standpoint, the state of origin is by no means a neutral actor in international investments, as it clearly benefits from the investment activities of its citizens abroad. Indeed, states actively promote businesses that originate within their respective legal orders, and that means they inherently support domestic investors. At a minimum, states negotiate BITs with the aim of guaranteeing the best possible conditions and the highest level of security and protection for their own investors.

A democratic state of origin that remains silent in the face of human rights abuses perpetrated by its investors abroad but prosecutes domestic human rights abuses in accordance with due diligence thus creates a double standard. Such territorial limitations on the obligation of states to prevent and punish human rights abuses correspond to a rather outdated formalistic logic¹⁸³ that may be incompatible with the nondiscrimination principle.¹⁸⁴ This is especially true when states maintain such double standards with respect to human rights. "Human rights" is an area of international law that incorporates objective values that the whole interna-

182. The Bhopal Gas Disaster case provides a good example of judicial ineffectiveness in protecting human rights. *See supra* note 8.

183. More broadly, particularly in connection with human rights protection, states should not "screen behind" a narrow interpretation of sovereignty and jurisdiction. According to the argument that will be set forth below, provided that there is no interference with the sovereign rights of the state exercising territorial jurisdiction, jurisdiction shall extend beyond the traditional basis of territoriality in such a manner as to allow other states to exercise—in the name of the effectiveness in human rights protection—a parallel extraterritorial jurisdiction.

184. *Coard v. United States*, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.L.V.II.106, doc. 3 rev. ¶ 37 (1999)

tional community is committed to safeguarding. Each and every state is authorized to react to human rights violations even in cases where the state is not directly affected. This section examines two possible legal bases for extending the due diligence human rights obligations beyond the territorial jurisdictional basis. Such an extension automatically enlarges the circle of states that may—or, perhaps, *must*—prevent and punish human rights violations by the investor. As will be argued, the first basis, universal jurisdiction, falls under the discretion of governments and, therefore, simply authorizes those governments to exercise jurisdiction, while the second basis, active personality, becomes a pure international obligation of the state of origin if seen from the perspective of extraterritoriality.

A. Bases of Jurisdiction

1. Universal Jurisdiction

One expression of this state of affairs is the relatively recent tendency, demonstrated by a number of states, to apply universal jurisdiction. Universal jurisdiction is the exercise of jurisdiction by a state, where there is no direct link between that state and the wrongful conduct.

As far as civil jurisdiction is concerned,¹⁸⁵ the most widely cited example is the United States Alien Tort Claims Act (“ATCA”) which provides that domestic courts have jurisdiction over civil actions brought by aliens for torts committed in violation of the law of nations or a treaty of the United States.¹⁸⁶ Although this statute, adopted in 1789, had been a

185. For an in-depth analysis of the issue of universal civil jurisdiction, see Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 142–163 (2006).

186. Particularly in the last few years, the ATCA served as the basis for brining cases against multinational corporations engaged in human rights violations in the territory of the host state (mostly for being complicit with local governments). See, e.g., *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009) (concerning non-consensual human medical experimentation in Nigeria); *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008) (concerning slave labor in Papua New Guinea); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080 (N.D. Cal. 2008) (concerning breaches of the rights of local population in the Niger Delta). On June 8, 2009, a settlement was reached in the case of *Wiwa v. Shell*, which concerned a claim brought under ACTA for the death of Ken Saro-Wiwa, one of the leading activists protesting against human rights breaches and the environmental harm caused in the region of the Niger delta by the investment activities of the defendant. Ignacio Saiz, *Wiwa v. Shell Settlement Just One Small Step Toward Ending Corporate Impunity*, CENTER FOR ECONOMIC AND SOCIAL RIGHTS, June 10, 2009, <http://www.cesr.org/article.php?id=363>. Ken Saro-Wiwa has been arrested by the authorities of Nigeria, tried by a special tribunal and executed on November 10, 1995. *Id.* The settlement did not require the defendant to assume responsibility for wrong doing.

dead letter for more than two hundred years, the U.S. Supreme Court recently confirmed its validity in *Sosa v. Alvarez-Machain*.¹⁸⁷ According to the Court, the term “law of nations” refers to the understanding of international law in the present day, rather than that at the time of the adoption of the statute.¹⁸⁸ Such understanding must “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the [eighteenth] century paradigms [the Court has] recognized.”¹⁸⁹ The *Sosa* Court held that a brief, arbitrary detention does not amount to a breach of international law with the specificity that customary international law requires, thereby skirting the jurisdictional issue presented by the ATCA.¹⁹⁰

Since the ATCA only grants a jurisdictional basis and not a cause of action, the cause of action must be established under substantive international law.¹⁹¹ Yet, as has rightly been pointed out, the Supreme Court’s *dicta* gives the impression that, for the ATCA to apply, it is not necessary for the norm violated to fall into a specific category, such as *jus cogens* or *erga omnes*.¹⁹² Rather, the Court seems only to require that the norm be mature, well-established, and specifically defined in international law.¹⁹³ The logical next question concerns whether the ATCA may serve as a basis for universal jurisdiction in every case of an individual’s violation of international law, regardless of the nature of the norm breached.¹⁹⁴

However, the defendant agreed to pay \$15.5 million to the plaintiffs as a “humanitarian gesture.” *Id.* There is little doubt that the choice of the defendant to proceed with such a generous and unprecedented “humanitarian gesture” was affected by the district court’s decision to recognize the existence of a jurisdictional basis under ATCA for crimes against humanity, extra-judicial killing, inhuman treatment, and arbitrary arrest and detention. *Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377 (S.D.N.Y. 2009).

187. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

188. *Id.* at 725.

189. *Id.*

190. *Id.* at 736–737.

191. *Id.*

192. Georg Nolte, *Universal Jurisdiction in the Area of Private Law – The Alien Tort Claims Act*, in *THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: JUS COGENS AND OBLIGATIONS ERGA OMNES* 373, 375–376 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006). Andrew J. Wilson notes that the term tort in the text of the ATCA may be misleading since international law lacks a clear separation between torts and crimes. Accordingly, the term may refer either to domestic torts or simply to “wrongs” committed in violation of international law. Wilson, *supra* note 46, at 47.

193. *Sosa*, 542 U.S. at 737–38.

194. For an overview of the opinions expressed in the literature on this issue, see Donovan & Roberts, *supra* note 185, at 142–45.

As mentioned above, obligations *erga omnes* reflect the idea of the existence of certain interests or values that are common to the international community as a whole rather than being exclusive to individual state. Accordingly, an obligation *erga omnes* is owed towards each and every state within the international community. This is why, in the case of wrongful conduct that breaches an obligation *erga omnes*, international law recognizes the legitimate interest and competence of states other than the one that is directly injured to invoke the international responsibility of the perpetrator.¹⁹⁵ Given this framework, one can reasonably argue that the exercise of universal jurisdiction to prosecute violations of norms of lower stature than *erga omnes* lacks justification in terms of positive international law.¹⁹⁶ As such, where the norm breached is not *erga omnes*, then a link must be established between the wrongful conduct and the legal order of the judicial *forum* exercising jurisdiction.¹⁹⁷ From there, it is arguable that universal civil jurisdiction might, in the future, prove to be broader than universal criminal jurisdiction.¹⁹⁸ While the latter can only be applied for a fairly small number of heinous internationally criminalized human rights abuses, civil universal jurisdiction may extend well beyond the limited number of international crimes, provided, of course, that the violated norms introduce obligations *erga omnes*.

However, U.S. judicial practice seems to neglect the *erga omnes* criterion. "In all ATCA cases decided to date, courts have held that only the gravest violations of human rights . . . violate the law of nations."¹⁹⁹ Si-

195. ILC Norms on State Responsibility, *supra* note 48, art. 48(1)(b). This very same article could—by analogy of law—be of use also when the author of the violation is an individual.

196. *But see* John G. Dale, *Transnational Legal Conflict Between Peasants and Corporations in Burma: Human Rights and Discursive Ambivalence Under the US Alien Tort Claims Act*, in *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL* 285, 302 (Mark Goodale & Sally Engle Merry eds., 2007) (arguing that the term "law of nations" refers to *jus cogens* norms).

197. Genc Trnavci, *The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claim Act and International Law*, 26 U. PA. J. INT'L BUS. L. 193, 259 (2005) (discussing the personal jurisdiction requirement and the applicable "minimum contacts" test).

198. *But see* Wilson, *supra* note 46, at 57–58 (arguing that the ATCA cannot be seen as an exercise of universal jurisdiction).

199. Trnavci, *supra* note 197, at 263–264. *See generally* Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *reh'g granted*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed per stipulation and judgment vacated*, 403 F.3d 708 (9th Cir. 2005) (forced labor, murder, and rape); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (ethnic cleansing); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (torture). By contrast, it has been held that the breach of the right to peaceful assembly does not fall under the ACTA since it is not yet

ilarly, the amicus briefs submitted by the European Community in the *Sosa* case suggested that universal civil jurisdiction should be limited to cases of “grave” violations of international law.²⁰⁰ The distance separating the two concepts—“grave” or serious violations of human rights and “each and every” *erga omnes* international norm—is considerable. The difference is primarily pragmatic rather than legal. Since universal jurisdiction is permissive rather than obligatory,²⁰¹ states have considerable discretion in exercising it. As a result, it is the national judicial branch, which, by deciding cases that are neither directly related to the national legal order nor to the state’s exclusive interests, decides whether to act as a unilateral guardian of certain universal values. Given that the exercise of a wider universal jurisdiction encompassing all violations of *erga omnes* norms would impose a substantial burden on a state’s judiciary, it is understandable for national courts to set certain screening criteria²⁰² even if these criteria are described in extra-legal or axiological terms.²⁰³ It appears, then, that there is a new category of international norms—something “stronger” than *erga omnes* but not quite as “strong” as *jus cogens*.²⁰⁴ Despite the fact that this new category has not yet been defined or named, its task is to provide a (still unformed) criterion for facilitating a reasonable balance between the need to effectively punish

definite enough to meet the standard introduced by *Sosa*. *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1095 (N.D. Cal. 2008).

200. Nolte, *supra* note 192, at 379. According to the European Community, the exercise of civil universal jurisdiction is not without restrictions. Among other criteria, it is argued that the *forum* must be “better suited.”

201. Donovan & Roberts, *supra* note 185, at 143. This is dependent on whether there is an international treaty that establishes an obligation for the state-parties to exercise universal jurisdiction. For example, the 1984 United Nations Convention Against Torture requires that states—besides territorial, active, and passive personality jurisdiction—also apply universal jurisdiction, in order to prosecute foreign perpetrators of acts of torture that have been committed outside their territory. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 5(2), *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85. In a recent decision, the ECHR explained that the exercise of universal jurisdiction in such a case is justified by the absolute nature (*jus cogens*) of the prohibition of torture and authorizes states to apply their respective domestic criminal legislation. *Ould Dah v. France*, App. No. 13113/03, Eur. Ct. H.R. (2009), *available at* <http://www.echr.coe.int/eng>.

202. For example, the *Sosa* Court set a standard for ATCA cases, mainly setting certain preconditions for the establishment of jurisdiction, in substance, it allows domestic courts to relinquish from adjudicating cases which are based on norms of international law that are not definite enough. However, in practice only the gravest of human rights violations have been found to meet the *Sosa* standard.

203. Such as the typically descriptive notion of “grave” violations, which to date fail to correspond to any typology of positive international law norms.

204. “*Erga omnes* plus,” or “*jus cogens* minus.”

heinous human rights abuses and a given state's capacity to shoulder responsibilities that do not belong exclusively to it. However, the national courts and tribunals are the only competent authorities to engage in such balancing.²⁰⁵

Even if it can be concluded that the ATCA may serve as the basis for universal civil jurisdiction in the case of "grave" and, in terms of the *Sosa* standard, sufficiently "definite," violations of *erga omnes* norms of international law, the question remains whether the ATCA grants jurisdiction to causes of action brought by foreign plaintiffs against private individuals and entities, including corporations, or only against persons or entities exercising public authority. While the existing case law suggests that ATCA jurisdiction is not predicated on the defendant exercising public authority,²⁰⁶ the picture that emerges is rather fragmented because there are not very many cases. Unfortunately, as of now, the case law creates more questions than it answers.

For instance, in *Kadic v. Karadzic*, the U.S. Court of Appeals for the Second Circuit concluded that, while the defendant was only liable for certain allegations to the extent that he was a "state actor," he could also be held liable for genocide and war crimes in his private capacity.²⁰⁷ As such, the reach of the "law of nations" is not strictly confined to state actors. However, since "torture and summary execution—when not perpetrated in the course of genocide or war crimes—are proscribed by international law only when committed by state officials or under color of

205. This is provided that the legislature intervenes. And even this route may be closed off in the United States in the future. See Kevin R. Carter, Note, *Amending the Alien Tort Claims Act: Protecting Human Rights or Closing Off Corporate Accountability?*, 38 CASE W. RES. J. INT'L L. 629, 639 (2006-2007). As Carter explains, there has been strong lobbying against universal jurisdiction on the basis of the ATCA. As such, it comes as no surprise that initiatives for amending it have already been undertaken. Amicus briefs submitted by a number of countries, including Australia, Switzerland, and the United Kingdom, to the U.S. Supreme Court in the *Sosa* case provide a number of arguments against universal civil jurisdiction (including sovereignty, conflict of legal commands, legitimacy). Some argue that universal civil jurisdiction should be applied in conformity with comity and *forum non conveniens*. Anne O'Rourke & Chris Nyland, *The Recent History of the Alien Tort Claims Act: Australia's Role in its (Attempted) Downfall*, 25 AUSTRAL. Y.B. INT'L L. 139, 139-176 (2006). In connection with that argument, see also John B. Bellinger III, *Enforcing Human Rights in the U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT'L L. 1 (2009) (presenting a more pragmatic approach by emphasizing the political and diplomatic burden of ATCA for the United States government, as well as the exigencies of the principle of the separation of powers).

206. Kelsy Deye, *Can Corporations be Held Liable under the Alien Tort Claims Act?*, 94 KY. L.J. 649, 649-667 (2006) (citing numerous cases).

207. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

law,” they are actionable under the ATCA only with regard to “state action.”²⁰⁸ If, on the other hand, the wrongs are committed in the course of genocide or war crimes, state action is not necessary in order to find liability, since the wrongs violate norms of international law that “bind[] parties to internal conflicts regardless of whether they are recognized nations or roving hordes of insurgents.”²⁰⁹

A similar, but not identical, conclusion was reached by the U.S. Court of Appeals for the Ninth Circuit in *Doe I v. Unocal Corporation*.²¹⁰ *Doe I* concerned an action brought against an American corporation for forced labor imposed on the local population by the army of Myanmar, which was responsible for security in the area where the corporation constructed a gas pipeline.²¹¹ The Court concluded that the alleged violations did indeed constitute breaches of international law, as “[t]orture, murder, and slavery are *jus cogens* violations and, thus, violations of the law of nations.”²¹² Furthermore, the Court held that, while “most crimes require state action for ATCA liability to attach,” the corporation could be held personally liable,²¹³ since “there are a ‘handful of crimes,’ including slave trading, ‘to which the law of nations attributes individual liability,’ such that state action is not required.”²¹⁴ Forced labor, being a modern variant of slavery, is one of those crimes.²¹⁵

The establishment of private liability on the basis of ATCA presupposes that the law of nations attributes such responsibility directly to the individual in his capacity as an international subject.²¹⁶ However, whether

208. *Id.* at 243.

209. *Id.*

210. *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *reh'g granted*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed per stipulation and judgment vacated*, 403 F.3d 708 (9th Cir. 2005). The case eventually settled in 2005 on confidential terms. *Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (granting the parties' motion to dismiss the appeals and vacating the district court's opinion).

211. *Unocal*, 395 F.3d, at 936–939.

212. *Id.* at 945.

213. Provided that it could be proven that Unocal (the corporation-defendant) aided and abetted the army in subjecting the local population to forced labor, so that a connection to the crime can be established.

214. *Unocal*, 395 F.3d at 945 (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 794–795) (D.C. Cir. 1984) (Edwards, J. concurring)).

215. *Id.* at 946.

216. For the types of individual conduct that have been interpreted as covered by ATCA, see Jean-François Flauss, *Compétence civile universelle et droit international général* [*Universal Civil Jurisdiction and General International Law*], in *THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER* 385, 405–06 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006). For a review of cases that have been brought against corporations before U.S. courts on the basis of ATCA, see Lucien J.

the concept of civil individual responsibility is to be construed narrowly (such that it requires that international law provide for a specific duty of the individual), or broadly (such that it comprises all objective international norms that impose obligations on the international community as a whole) remains at the discretion of the national judge. The *pro homine* advantage of construing individual responsibility broadly is that it will cover a breach of each *erga omnes* norm committed by private actors, such as human rights abuses by multinational corporations. In its narrowest possible interpretation, individual responsibility will be limited to a small number of internationally wrongful acts that expressly address conduct of individuals and that, by their terms, establish a basis for holding the individual internationally responsible. In that case, the universal civil jurisdiction over private individuals and entities will end up being parallel to criminal jurisdiction, which, in turn, is limited to only the gravest of human rights violations. Indeed, the case law presented here reveals a certain U.S. tendency to confer civil jurisdiction on the basis of international criminal responsibility of individuals.

Nonetheless, despite any criticisms of civil universal jurisdiction's appropriation of tools developed in the framework of international criminal law—tools that are foreign to its civil counterpart—one should keep in mind that, since universal jurisdiction is traditionally criminal in nature,²¹⁷ it contains certain elements that can be very useful to civil jurisdiction.²¹⁸ Furthermore, criminal universal jurisdiction has been developed in light of the *aut dedere aut iudicare* principle, which is seen as a remedy against the impunity from prosecution for certain gross human rights violations considered to be the common responsibility of the whole international community. Given the gravity of these violations, the international community moved in the direction of criminalizing them and holding perpetrators personally liable, regardless whether they acted in the course of their state functions or as individuals.

Dhooge, *The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism*, 35 GEO. J. INT'L L. 3, 25–65 (2003).

217. In terms of criminal universal jurisdiction, states unilaterally extend their jurisdiction to prosecute and punish foreigners who commit crimes against foreigners abroad. This is true despite the lack of any direct link (principle of territoriality, nationality of either the offender or the victim, flag, or protection, related to situations threatening or damaging state fundamental interests) between the state asserting jurisdiction and the crime. The literature on the question of universal criminal jurisdiction is very rich. See LUC REYDAMS, *UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL ASPECTS* (2003) (offering a comparative overview of national practices on the topic); ALEXANDER ZAHAR & GÖRAN SLUITER, *INTERNATIONAL CRIMINAL LAW* 296 (2008).

218. Such as the criminal law “tools” for establishing complicity.

As in the case of universal civil jurisdiction, there are several arguments against a state's unilateral exercise of universal criminal jurisdiction. The point of departure is always the legality of this practice in terms of international law and the concern of noninfringement of state sovereignty. However, the practice also implicates a number of more specific questions, such as the applicability of the maxim *ne bis in idem* and the problem of concurrent jurisdictions,²¹⁹ as well as the need for coordination between parallel competencies.²²⁰ The picture becomes even more blurred if one considers that international law lacks general norms with respect to criminal jurisdiction, and, therefore, states enjoy significant discretion in setting the criteria according to which they will assume jurisdiction.²²¹ Therefore, according to the Permanent Court of International Justice ("PCIJ"),²²² every state "remains free to adopt the principles [that] it regards as best and most suitable," provided it "does not overstep the limits [that] international law places upon its jurisdiction."²²³

The ICJ had the opportunity to examine the legality of universal criminal jurisdiction in terms of international law and to bring certain criteria to the forefront that, if disrespected, would render the exercise of universal jurisdiction by national courts *ultra vires*, which would result in states being held internationally responsible for wrongful acts carried out by their judiciaries. In the *Arrest Warrant* case,²²⁴ the government of the Democratic Republic of Congo ("DRC") filed an application before the ICJ against Belgium claiming that Belgium's issuance, pursuant to the Belgian Universal Jurisdiction Law,²²⁵ of an international arrest warrant

219. Although it is generally accepted that the right of an accused person not to be prosecuted twice for the same offense is applicable only within a national context, recent tendencies in legal scholarship recognize the existence, under certain conditions, of an inter- or transnational effect of the maxim. See Gerard Conway, *Ne Bis in Idem in International Law*, 3 INT'L CRIM. L. REV. 217 (2003).

220. It is generally sustained that universal jurisdiction should be applied only in the case that the *fora* which are territorially or personally linked to the wrong are unwilling or unable to bring the perpetrators to justice. Legal scholarship generally tends to criticize the so-called "absolute" universal jurisdiction. Under the "conditional" universal jurisdiction, the prosecution of an international crime can only be exercised by a state if the accused person is on its territory. See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 338, 338–39 (2d ed. 2008).

221. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 19.

222. The ICJ is the successor to the PCIJ.

223. S.S. Lotus, 1927 P.C.I.J. at 19.

224. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14).

225. *Id.* at 9 (referencing the Belgian "Law of June 16, 1993 'concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional', as amended by the Law of 10 February

in absentia against the DRC's foreign minister, Mr. Yerodia Ndombasi, violated international law.²²⁶ The Court focused its analysis on the question of the extent of the immunity that the DRC minister enjoyed under customary international law,²²⁷ skillfully avoiding having to take a position on the issue of universal jurisdiction.²²⁸

The universal jurisdiction phenomenon reflects the necessity for alternative and activist solutions to the drawbacks of international law. While the International Criminal Court centralizes and internationalizes the fight against impunity, its jurisdiction depends—one way or another—on states' willingness. Consequently, despite the absence of a clear answer on its legality and the conditions of its application, universal criminal jurisdiction remains in the foreground. At the same time, the effect of universal criminal jurisdiction is limited to a small number of crimes—those considered of universal concern. As such, a minimum level of gravity is required for universal criminal liability. Although it is possible that investor conduct could rise to such a level, if universal jurisdiction were to be the sole basis for punishing human rights abuses by corporations, a large number of everyday offenses would go unpunished.

2. Active Personality Jurisdiction

State practice, as reflected in national criminal law, provides an alternative to the universal basis of jurisdiction that may prove to be of great utility in punishing the illegal conduct of investors abroad. Under the active personality (or "active nationality") basis of criminal jurisdiction, states are competent to prosecute their nationals (and in some legal orders, persons domiciled in their territory), without regard to the place where an offense was committed.²²⁹ While an indirect link—based on the

1999 'concerning the Punishment of Serious Violations of International Humanitarian Law'').

226. *Id.* at 9–10. The Belgian arrest warrant charged Mr. Yerodia Ndombasi with grave breaches of the 1949 Geneva Conventions and crimes against humanity. *Id.* at 9.

227. *Id.* at 19–22.

228. However, the ICJ may take the opportunity to address this question in a case currently pending before it. *Certain Criminal Proceedings in France (Congo v. Fr.)*, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=129>. It should be noted that in a separate opinion, the former president of the ICJ, Judge Guillaume, concluded that universal jurisdiction exists against piracy. *Arrest Warrant*, 2002 I.C.J. at 37–38 (separate opinion of Judge Guillaume). Also, in a separate opinion, Judge Koroma added genocide and slave trade to the list of crimes subject to universal jurisdiction. *Id.* at 61–62 (separate opinion of Judge Koroma).

229. In terms of the narrower version of the active personality principle, the exercise of jurisdiction hinges on the condition that the conduct also be illegal within the legal order of the *locus delicti*, the place where the offense is committed.

concept of obligations *erga omnes*—between the forum and the wrongful act suffices to establish universal jurisdiction, the link between the wrongful conduct and the forum has to be more tangible and direct to establish “active personality” jurisdiction. Active personality stems from the notion that states have both a responsibility and a legitimate interest in preventing and punishing offenses committed by their own nationals, who remain their subjects even when they are abroad. In light of the fight against impunity, active personality jurisdiction can be seen as a sort of counter-balance to state policy of refusal to extradite nationals.

Obviously, the application of the active personality basis for punishing human rights abuses committed abroad by the investor raises a number of technical problems.²³⁰ First and foremost, as argued above, the complicated corporate structure of multinational firms makes the determination of their nationality difficult.²³¹ Second, where the domestic legal order confines prosecution to natural persons, the attribution of criminal responsibility to the people participating in corporate decision-making proves to be a rather thorny issue. Nonetheless, since active personality is a unilateral basis for the exercise of jurisdiction that, in substance, associates an illegal act with the legal order of the forum exercising jurisdiction, it vests that very same legal order with the authority to solve these issues.

Like universal jurisdiction, active personality jurisdiction is the product of state practice. Both these principles reflect the idea that states enjoy discretion in unilaterally establishing the jurisdictional bases within their domestic legal systems.²³² Nonetheless, this Article argues that, un-

230. Olivier de Schutter, *L'incrimination Universelle de la Violation des Droits Sociaux Fondamentaux* [Universal Criminalization of the Violation of Fundamental Social Rights], 64 ANNALES DE DROIT DE LOUVAIN 209, 209–245 (2004). Olivier de Schutter examines this issue in regard to the legislation adopted by Belgium for the “universal incrimination” of the violation of fundamental social rights. After proving that, in reality, the legislation does not confer the judiciary with universal jurisdiction but an active personality jurisdiction, De Schutter discusses its compatibility with international law and analyzes certain problems related to its application against moral persons.

231. See *supra* Part I.B.

232. Even scholars who are skeptical of the idea of universal jurisdiction in terms of its compatibility with international law tend to recognize that active personality is allowed. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 36–37 (Feb. 14) (separate opinion of Judge Guillaume). Judge Van den Wyngaert, in a dissenting opinion in the *Arrest Warrant* case, drew a broader theoretical framework. According to Judge Van den Wyngaert, a distinction should be made between prescriptive jurisdiction and enforcement jurisdiction. *Id.* at 167–68 (separate opinion of Judge Van den Wyngaert). As such, despite its extraterritorial effects, the active personality jurisdictional basis is permitted for states, as long as it does not lead to material acts of extraterritorial enforcement. *Id.*

like universal jurisdiction, which does not introduce an obligation on states to apply it, active personality represents one of the means by which states can comply with their due diligence obligations. When viewed only from the due diligence standpoint, a state of origin's use of active personality jurisdiction to prosecute human rights abuses committed by investors in the host state is not discretionary,²³³ but rather constitutes an international obligation. The only condition for the validity of this argument is that states' human rights obligations extend beyond their territory.

B. The Question of Extraterritoriality Revisited: Beyond the Criterion of Effectiveness in the Exercised Control

Although a considerable amount of international case law has been produced in recent years on the issue of extraterritoriality in the protection of human rights,²³⁴ the specific proposal examined in this Article has never been subject to judicial analysis. However, as always, the lack of a judicially validated answer leaves the door wide open for unbridled debate among scholars. This section will review the ways in which the existing case law, while not quite on point, is often relevant nonetheless, and offers, at the very least, significant probative insight. The cases to be discussed are divided into two broad categories.²³⁵ The first group of cases, while focusing on obligations arising from conduct directly attributable to states, is included to demonstrate that, regardless of the highly problematic nature of the basis that has been used, the metaphorical um-

233. John Ruggie, the U.N. Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises noted in his 2008 report that while

experts disagree on whether international law requires home States to help prevent human rights abuses abroad by corporations based within their territory, there is greater consensus that those States are not prohibited from doing so where a recognized basis of jurisdiction exists and the actions of the home State meet an overall reasonableness test, which includes non-intervention in the internal affairs of other States.

Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 19, delivered to the General Assembly, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

234. For a comprehensive overview of the extraterritorial effect of human rights, see EXTRATERRITORIAL APPLICATION OF HUMAN RIGHT TREATIES (Fons Coomans & Menno T. Kamminga eds., 2004).

235. For a different classification, as well as for an overview of the existing case law, see Virginia Mantouvalou, *Extending Judicial Control in International Law: Human Rights Treaties and Extraterritoriality*, 9 INT'L J. HUM. RTS. 147, 147–163 (2005).

bilical cord of territoriality has been categorically cut. The second group of cases is more relevant to this Article's specific discussion of the obligations of a state to exercise vigilance with respect to extraterritorial human rights abuses.

1. Extraterritorial Obligations and Direct Attribution

The first category of cases corresponds to situations where, although the wrongful conduct was committed outside the territory of a state, it is directly attributable to that state. As it often happens, regional judicial regimes—especially those of the ECHR—were at the forefront of this evolution.²³⁶ Still, despite the ECHR's contribution to the general context of extraterritoriality, this section argues that that Court's role is not without any side effects, and that there is a strong risk of “embedding” the function of the universal protection of human rights with characteristics that are inherent only to the regional level of protection.

So far, the ECHR has extended the reach of the European Convention beyond state territory for wrongful conduct directly attributable to a state in two types of cases: (1) where state-agents committed human rights abuses abroad,²³⁷ and (2) where a *de facto* control was exercised over the territory of another state.²³⁸ According to the ECHR, the *conditio sine qua non* for such an extraterritorial effect of the European Convention provisions is that the control exercised by state authorities is “effec-

236. See, e.g., Michael Gondek, *Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?*, 52 NETH. INT'L L. REV. 349, 349–387 (2005); Aysegül Uzun, *Extraterritorial Application of the European Convention on Human Rights: An Overview of the Strasbourg Case-Law*, in THE RULE OF LAW IN PEACE OPERATIONS 451, 451–472 (Int'l Soc'y for Military Law and the Law of War ed., Report of 17th International Congress, 2006).

237. See, e.g., *Öcalan v. Turk.*, App. No. 46221/99, Eur. Ct. H.R. (2003), available at <http://www.echr.coe.int/eng/Press/2005/May/GrandChamberjudgmentOcalanvTurkey120505.htm>. There, the ECHR held that the alleged violations fell under the jurisdiction of the respondent state, since the applicant, who was arrested by Turkish officials in the territory of a third country “was subject to their authority and control” and, therefore, under “effective Turkish authority” (effective control over persons). *Id.* ¶ 93; see also *Issa v. Turk.*, App. No. 31821/96, Eur. Ct. H.R. ¶ 71 (2004), available at <http://www.echr.coe.int/Eng/Press/2004/Nov/ChamberjudgmentIssaandOthersvTurkey161104.htm> (giving an extensive list of relative case law of other international human rights fora); *Coard v. United States*, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.L.V.II.106, doc. 3 rev. ¶ 37 (1999).

238. See *Loizidou v. Turk.*, 310 Eur. Ct. H.R. (ser. A) at 23–24 (Judgment on Preliminary Objections) (1995); *Loizidou v. Turk.*, 1996-VI Eur. Ct. H.R. 2216, 2234–35 (Judgment on the Merits); *Ilaşcu v. Mold. and Russ.*, 2004-VII Eur. Ct. H.R. 179, 263.

tive,²³⁹ even if it is exercised temporarily.²⁴⁰ The failure to prove that the state—accused of breaching human rights outside its territory—exercised an effective control over the violative conduct excludes the applicability of the European Convention regardless of whether the conduct could, in terms of the law on state responsibility, be attributable to that state.²⁴¹ That is to say that, under the European Convention regime, the attribution to a state of a wrongful act committed outside its territory, does not automatically authorize the ECHR to exercise jurisdiction. Next to the preliminary question of the attribution of the wrongfulness, the ECHR case law has raised a second, artificial criterion—namely, the effectiveness in the exercised control.

However, the activist choice of the ECHR in the *Loizidou* case²⁴² to silently “isolate” the criterion of effective control from the norms regarding the attribution of internationally wrongful acts—done in order to directly transpose it as an artificial condition for the limitation of the extraterritorial effect of the European Convention²⁴³ (and, consequently, of its own judicial competence)—is rather unfortunate. Although, admittedly, the ECHR case law succeeded in effectively cutting the cord of territoriality in human rights protection, the criterion of effectively exercised control appears—in terms of positive law—to be a rather problematic

239. *Loizidou*, 310 Eur. Ct. H.R. at 23–24; *Loizidou*, 1996-VI Eur. Ct. H.R. 2234–35; *Ilaşcu*, 2004-VII Eur. Ct. H.R. at 263.

240. *Issa v. Turk.*, App. No. 31821/96, Eur. Ct. H.R. ¶ 74 (2004), available at <http://www.echr.coe.int/Eng/Press/2004/Nov/ChamberjudgmentIssaandOthersvTurkey161104.htm>.

241. In a controversial decision of the ECHR on admissibility in *Banković v. Belgium*, the court held that, under the terms of the European Convention, the breaches of human rights in the territory of a third country fall under the jurisdiction of the state who perpetrated it only if that state has effective control over the territory. *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 356–59; see also *Hussein v. Albania*, App. No. 23276/04, Eur. Ct. H.R. (2006), available at <http://www.echr.coe.int/eng/press/2006/March/HUSSEIN%20ADMISSIBILITY%20DECISION.htm> (declaring the case inadmissible because the applicant “has not demonstrated that [the respondent states] had jurisdiction on the basis of their control of the territory where the alleged violations took place.”).

242. *Loizidou*, 310 Eur. Ct. H.R. at 31. Although the reasoning of the ECHR lacks the clarity that one would expect from a judicial *forum* of its standing, the Court jointly answered in the affirmative the questions of both the attribution of the conduct to the respondent state and the extraterritorial jurisdiction of that state (and consequently of the Court itself).

243. *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. ¶¶ 47–82.

construction that threatens to negatively affect the broader regime of human rights protection at the universal level.²⁴⁴

In terms of positive international law, the rules governing attribution are secondary state obligations that refer to state responsibility. By contrast, the concept of jurisdiction—both territorial and extraterritorial—stems from the framework of primary state obligations and serves as the basis for delimiting the sphere of competence. That being explained, it becomes clear that the questions of attribution and extraterritoriality are regulated by different bodies of law and should therefore have been treated by the ECHR separately.²⁴⁵ Since the premises and the *raison*

244. See, e.g., General Comment No. 31, *supra* note 96, ¶ 10 (requiring that states “respect and ensure the rights laid down in the [ICCPR] to anyone within [their] power or effective control . . . even if not situated within [their] territory”).

245. Without necessarily affecting the correctness of the conclusions drawn, the tendency to confuse attribution with extraterritoriality is present also in the case law that the ICJ produced after the relevant ECHR case law. For instance, in the *Armed Activities on the Territory of the Congo* case, the ICJ concluded that “Uganda’s responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account,” but only after the Court was satisfied that the respondent state exercised—as an occupying power—effective control over a part of the territory of the Democratic Republic of Congo. *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), at 60 (Dec. 19, 2005), available at <http://www.icj-cij.org/docket/files/116/10455.pdf>. In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ opted for a broader approach. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, (July 9, 2004), available at <http://www.icj-cij.org/docket/files/131/1671.pdf>. There, the ICJ simply stated that

while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.

Id. ¶ 109. However, although the ICJ seems reluctant in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* opinion to rely on the criterion of effective control, presumably, the control that an occupying power exercises is *ipso facto* an effective one. See *id.* Lastly, in its recent Order on Provisional Measures in the *Georgia v. Russia* case, the ICJ took an equally broad view with regard to the territorial reach of the UN Convention on the Elimination of All Forms of Racial Discrimination. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ. Fed.) (Req. for the indication of Provisional Measures) (Order of Oct. 15, 2008), available at <http://www.icj-cij.org/docket/files/140/14801.pdf>. There, the ICJ observed:

d'être of the two legal bases are divergent, attribution cannot serve as the basis for extraterritoriality or be treated as a pretext for jumping into unjustified conclusions about the limits of judicial competence. However, in assessing ECHR's practice, one has to recognize that the European Convention is in fact a treaty "operating in an essentially regional context" and is "not designed to be applied throughout the world, even in respect of the conduct of the State Parties to it."²⁴⁶ In other words, the criterion of the effectiveness in the exercised control is akin to an artificial tool that has been maladroitly developed by a regional court when that court felt the necessity to somehow delimitate its competence in a way that would enable it to maintain its regional nature and avoid ending up a *de facto* quasi-global court.²⁴⁷

However, these constraints are inherent only to regional systems of protection. They are absent in cases of customary human rights norms and the so-called UN human rights system, which are by definition universal. In light of this, it is arguable that at the universal level, extraterritoriality should not be limited by the criterion of effectiveness in the control exercised over a situation. As such, states should simply be prohibited from acting outside their territory—either through their organs or

Whereas the Parties [to the conflict] disagree on the territorial scope of the application of the obligations of a State party under CERD . . . [the] provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory.

Id. ¶ 108–09. However, the general extraterritorial effect of the CERD does not appear to be the result of an explicit rejection by the ICJ of the criterion of effectiveness in the exercised control. Quite the contrary, the Court chose to justify its interpretation on the wording of the CERD in that "there is no restriction of a general nature in CERD relating to its territorial application . . . [and], in particular, neither Article 2 nor Article 5 of CERD, alleged violations of which are invoked by Georgia, contain a specific territorial limitation." *Id.* at 109.

246. Christos Rozakis, *The Territorial Scope of Human Rights Obligations: The Case of the European Convention on Human Rights*, in *THE STATUS OF INTERNATIONAL TREATIES ON HUMAN RIGHTS* 55, 63 (Venice Commission ed., 2006). As the ECHR points out, other international instruments designed for the protection of human rights expressly recognize a broader semantic field to the term "jurisdiction." *Banković*, 2001–XII Eur. Ct. H.R. at 357–58.

247. This delimitation arguably circumvented the effect of the European Convention on Human Rights. Of course, other objectives do exist as well. For example, the criterion of the effectiveness in the exercised control was used by the ECHR to allow the Court "escape" from exercising jurisdiction on the merits of certain highly politicized cases, such as the NATO military intervention over Kosovo and the occupation of Iraq by the United Kingdom. See *Hussein v. Albania*, App. No. 23276/04, Eur. Ct. H.R. (2006), available at <http://www.echr.coe.int/eng/press/2006/March/HUSSEIN%20ADMISSIBILITY%20DECISION.htm>; *Banković v. Belgium*, 2001–XII Eur. Ct. H.R. 333.

through third subjects whose conduct is attributable to them—in a way that they are not allowed to behave on their own.²⁴⁸ In this case, extraterritoriality and direct attribution do in fact converge.

2. Extraterritorial Obligations under Due Diligence

Within the second general category of extraterritorial effect of human rights norms, the question is whether the sphere of jurisdiction should be limited only to those actions or omissions that are “directly” attributable to the state. Interestingly, the ECHR provided an answer to this question even before crystallizing its effective control criterion as a condition for the extraterritorial enlargement of jurisdiction over conduct attributable to one of the parties to the European Convention.

In the *Soering* case, the United States asked that the United Kingdom extradite a German national who committed a crime on U.S. territory.²⁴⁹ Noting that the accused would be kept on death row for a prolonged period of time if the United Kingdom proceeded with the extradition, the Court concluded that the respondent state (the United Kingdom) would be found in breach of Article 3 of the European Convention, which prohibits torture and inhuman or degrading treatment.²⁵⁰ According to the Court’s opinion, the requirement set forth in the very first article of the European Convention—to “secure to everyone within their jurisdiction the rights and freedoms” protected by the European Convention—cannot be read as creating an obligation for states to impose the Convention standards on third states.²⁵¹ Nonetheless, the European Convention does develop an extraterritorial effect in the sense that, even if “the United Kingdom has no power over the practices and arrangements of the Virginia authorities which are the subject of the applicant’s complaints . . . [t]hese considerations cannot . . . absolve the Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction.”²⁵²

In other words, in cases of extradition, the respondent state can in fact be found internationally responsible for conduct that was neither committed by its own agents nor took place on its territory. The semantic field of prohibition of torture develops extraterritorial effect to guarantee

248. U.N. Hum. Rts. Comm., *Delia Saldias de Lopez v. Uruguay*, ¶ 12(3), U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981), available at <http://www.unhcr.org/>; see also *Issa*, *supra* note 237, ¶ 71.

249. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 12 (1989).

250. *Id.* at 44–45.

251. *Id.* at 33–34.

252. *Id.* at 34.

that there will be no risk of individuals suffering a violation.²⁵³ The state exercising (effective) jurisdiction over a subject is obligated to adopt the available necessary measures to prevent a foreseeable violation. The preventive extraterritorial effect of the obligation is justified in terms of the effectiveness required by the European Convention in the protection of an absolute human right that does not allow for derogations (i.e., *jus cogens*) and that will amount to an irreparable violation.²⁵⁴ Finally, it should be noted that the *jus cogens* nature of the protective norm is not a condition for the extraterritorial effect of the due diligence obligations in the field of human rights. The ECHR recognized the same effect with respect to the right to life “in circumstances in which the expelling state knowingly puts the person concerned at such a high risk of losing his life that the outcome is a near-certainty.”²⁵⁵ Since both the right to life and the prohibition of torture are closely linked to human physical integrity, one could argue that the Court tends to limit the extraterritorial effect of due diligence only to the most “serious” human rights violations. However, once the criterion of *jus cogens* is eliminated, the road is open for the case law—in the name of *effet utile*—to enlarge the circle of rights.

In the *H.L.R.* judgment regarding deportation, the ECHR recognized an indirect horizontal effect to the extraterritorial dimension of due diligence for the safeguarding of Article 3 of the European Convention.²⁵⁶ “Owing to the absolute character” of Article 3, the ECHR found that the right is to be protected from the risk of a foreseeable violation abroad even if “the danger emanates from persons . . . who are not public officials.”²⁵⁷ Nonetheless, the right’s extraterritorial dimension is limited by the fact that “[i]t must be shown that . . . the authorities of the receiving

253. See *Saadi v. Italy*, App. No. 37201/06, Eur. Ct. H.R. (Feb. 28, 2008), available at http://www.echr.coe.int/ECHR/homepage_en. There, the Court had the opportunity to reassert the absolute prohibition of extradition in a situation where the respondent state was suspicious that the applicant was involved in international terrorism. Holding that a “real risk” for the right of the applicant existed despite the relevant diplomatic assurances provided by the authorities of the receiving state, the ECHR noted that since “the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim’s conduct, the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3.” *Id.* ¶ 127 (internal citation omitted).

254. *Id.* ¶ 87–90.

255. See *Dougoz v. Greece*, App. No. 40907/98, Eur. Ct. H.R. (Feb. 8, 2000), available at http://www.echr.coe.int/ECHR/homepage_en (case law cited therein); see also U.N. Hum. Rts. Comm., Commc’n No. 470/1991: *Kindler v. Canada*, ¶ 6(2), 13(1), U.N. Doc. CCPR/C/48/D/470/1991 (Nov. 11, 1993).

256. *H.L.R. v. France*, 1997-III Eur. Ct. H.R. 745.

257. *Id.* at 758.

state are not able to obviate the risk by providing appropriate protection.”²⁵⁸ Accordingly, the respective obligations to prevent the violation of human rights through affirmative conduct of the territorial state and the state exercising effective control are autonomous and parallel to each other with the latter state’s obligation being subsidiary in nature and only activated where the territorial state is unable or unwilling to provide effective protection.

Nonetheless, it should be noted that the case law puts emphatic emphasis on effectiveness of exercised control, even though it is a rather artificial tool geared toward the need for regional systems to be able to maintain their regional nature and avoid the burden of exercising jurisdiction over each and every international human rights violation. However, the ECHR provided a contradictory example in the *Ilașcu* case where the Court seemed to imply that the effective control test does not apply at all in the case of extraterritorial due diligence/affirmative obligations.²⁵⁹ There, the applicants claimed illegal detention by the “Moldavian Republic of Transnistria” (“MRT”), an entity that proclaimed independence in 1991.²⁶⁰ There were two respondent states—Russia, which was exercising effective control over “MRT” and, therefore, *de facto* jurisdiction, and Moldova, which was exercising no control at all over that part of its territory. In light of the fact that the conduct of the *de facto* entity was directly attributable to Russia, it was natural that Russia was deemed responsible. However, the Court reached a surprising conclusion:

[E]ven in the absence of effective control over the Transnistrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.²⁶¹

The condemnation of Moldova by the Court was justified on the basis of the country’s failure to adopt positive measures for the safeguarding of the applicants’ rights, which continued to fall under Moldova’s jurisdiction despite the lack of any type of effective control, either over the territory (*de facto* extraterritoriality) or over the persons (victimizers and victims alike).²⁶² As the Vice President of the ECHR, Judge Rozakis, noted:

258. *Id.*

259. *Ilașcu v. Moldova and Russia*, 2004-VII Eur. Ct. H.R. 179.

260. *Id.* at 199.

261. *Id.* at 266.

262. *Id.* at 267–72.

[T]he Court in the case of *Ilaşcu* took a different approach by incorporating the issue of positive obligations within the very notion of jurisdiction and by disregarding the test of effective control as a precondition for the establishment of jurisdiction. . . . It clearly transpires from the *Ilaşcu* judgment that the Court has developed a rather subjective test in determining whether Moldova faced up to its positive obligations, by calling into question its political tactics in effectively protecting the human rights of the individual applicants. . . .²⁶³

Arguably, then, the extraterritorial effect of due diligence in the protection of human rights does not rely on the condition of effective control. However, this is not meant to imply that effectiveness is deprived of any practical significance. Due diligence, being an obligation of means, relies upon the condition that the state dispose of the necessary means to preempt wrongfulness. Obviously, the wider the extent of control that a state exercises over a given situation, the more the state is capable of guaranteeing the effectiveness of the affirmative conduct. In other words, expectations of effectively demonstrated diligence should be proportionate to the effectiveness of control the state exercises over a given situation. However, even in the case of absolute absence of control, provided that the state is linked to the situation, the state's authorities are expected to demonstrate an effort to prevent wrongfulness by any means available (even purely political). The sole condition for a state to bear an obligation to demonstrate diligent protection of human rights beyond its national territory is simply that the state be somehow linked with the situation.²⁶⁴ Clearly, the more tangible the link between the state and the specific situation, the stronger the obligation that the state to adopt affirmative conduct.

As previously noted, universal jurisdiction entails an indirect, normative link between wrongfulness and domestic courts, namely the *erga omnes* quality of the breached norm. In that scenario, the state enjoys absolute discretion. Where the state is not directly linked with the wrongfulness of the investor, the exercise of extraterritorial jurisdiction remains optional. However, given the broad extraterritorial effect developed under the due diligence principle, a home state that is directly linked—through the bonds of nationality—to human rights violations committed by its own citizen-investors abroad is expected to exercise jurisdiction on

263. Rozakis, *supra* note 246, at 70.

264. *But see* Carsten Hoppe, *Passing the Buck: State Responsibility for Private Military Companies*, 19 EUR. J. INT'L L. 989, 994, 1012–1013 (2008) (examining this question in light of the responsibility of the state for the illicit activities of the private military companies hired by it and suggesting that the condition of effective control for the exercise of extraterritorial jurisdiction applies as well in the case of the due diligence-stemming positive obligations of the state).

the basis of active personality. In that case, the exercise of active personality jurisdiction ceases to be a “privilege” for the home state and becomes an international obligation.²⁶⁵

Finally, while the case law presented in this Article leaves no room for doubts concerning the conditioned extraterritorial effect of the due diligence obligations in the field of human rights, a potential objection is that, in these cases, states are in fact exercising effective control over the victim of the violation and not over the victimizer. Arguably, then, if the analogy must be a perfect one, the existent case law is inadequate to conclude, in positive terms, that the state of origin is obliged to undertake the prevention and punishment of the violations of human rights perpetrated abroad by its investors.

In countering this objection one could argue, as the *Ilașcu* judgment indicates, that there is nothing to suggest that the application of the extraterritorial effect of due diligence should be restricted only to control exercised over victims. On the contrary, there are numerous good rea-

265. One of the questions examined by the ICJ in the *Genocide Case* was the alleged responsibility of Serbia for failing to prevent and punish—on the basis of the Convention for the Prevention and Punishment of the Crime of Genocide—the genocide against Bosnian Muslims in Srebrenica. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Genocide case*) (Bosn. & Herz. v. Serb. & Mont.) (Judgment of Feb. 26, 2007), ¶ 425, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=2> (Judgment of Feb. 26, 2007). The massacre was committed by Serbian nationals acting outside the territory of Serbia and was not attributable to it. The Court made clear that the duty to prevent corresponds to an obligation of conduct and decided to distinguish the two aspects of due diligence, namely prevention and punishment, and to consider them separately. *Id.* ¶ 425–30. With respect to the obligation to punish, the Court noted that, given that the genocide has not been carried out in the territory of Serbia, Serbian tribunals were—under the Genocide Convention—allowed to punish it, but not obliged to do so. *Id.* ¶ 442. Moreover, the ICJ concluded that Serbia had an obligation to cooperate with the ICTY. *Id.* ¶ 443. The *prima facie* impression given by ICJ’s decision is that it refuses to recognize the extraterritorial effect of the duty to punish. However, a more careful reading of the judgment reveals that the Court wished to remain “faithful” to the text of the Genocide Convention, which was its sole focus. As the Court made clear from the very beginning of its analysis on the duty to protect, the content of that duty varies from one instrument to another. Therefore, making a more general statement on the duty to protect is not within the Court’s scope. *Id.* ¶ 429. Hence, the margin of appreciation that it recognizes to the respondent state concerning the punishment of genocide at domestic level stems exclusively from Article VI of the Genocide Convention, which is also establishing an obligation for it to co-operate with ICTY. *Id.* ¶¶ 442–43. The aim of the Court is clearly not to depart from the regime of the “Genocide Convention” and to put the accent to the obligation for Serbia to co-operate with ICTY. Given these remarks, the Genocide Case cannot serve as a source for drawing more general conclusions on the nature of the extraterritorial effect of the duty to punish on the basis of active personality.

sons—hinged on international reality, as well as the normative structures of international law—for why the extraterritorial effect of the due diligence obligations of the state of origin should cover human rights abuses committed by investors abroad. First, the international reality today is such that, while host states are often not in a position to effectively protect the local population from the wrongful conduct of investors, international law remains quasi-silent at best, as to the international responsibility of investors. This creates a clear necessity to fight impunity in the field of international investments, and states should be expected to make a positive contribution toward that goal. Additionally, at the normative level, the *raison d'être* of the international law of human rights is to provide effective protection. Therefore, in terms of positive international law, states have the duty to fight human rights abuses through diligent conduct to the best of their capacities. After territoriality, nationality offers the second most pragmatic, substantive, tangible, and material basis allowing for the extension of jurisdiction beyond territory in order for states to effectively protect “legitimate community interest[s]”—obligations *erga omnes*—of the global community.²⁶⁶

That being said, it comes as no surprise that the CESCR included, in its *Comment* on the right to water, a clear obligation for states “to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries.”²⁶⁷ According to the line

266. General Comment No. 31, *supra* note 96, at ¶ 2.

267. General Comment No. 15, *supra* note 147, at ¶ 33. The ICESCR, in contrast to the majority of other human right instruments, remains silent as to its jurisdictional sphere of application. Instead of defining it in terms of territory or jurisdiction, it only mentions, in Article 2(1), that all states must take steps, individually and through international assistance and cooperation to achieve the full realization of the rights enlisted in it. ICESCR, *supra* note 118, art. 2(1). By emphasizing the concept of progressive realization, Matthew Craven suggests that a “territorial conception of economic, social and cultural rights . . . puts into question the very rationale of ESC rights.” Matthew Craven, *The Violence of Dispossession: Extra-Territoriality and Economic, Social and Cultural Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ACTION 71, 78 (Mashood A. Baderin & Robert McCorquodale eds., 2007). Fons Coomans suggests that, given the nature of social rights, there is no need for an immediate and direct link with the wrongful conduct of the state as the extraterritorial application of social rights “often relates to general situations of deprivation that cannot always be qualified in terms of violations of [social] rights of specific individual victims.” Fons Coomans, *Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights*, in EXTRATERRITORIAL APPLICATION OF HUMAN RIGHT TREATIES 183, 186 (Fons Coomans & Menno T. Kamminga eds., 2004). Therefore, according to Coomans, extraterritoriality “cannot be qualified as the exercise of effective authority and control over persons, although persons in another country may be affected by a decision taken in a (donor) country.” *Id.*

of reasoning presented in this Article, such prevention cannot extend beyond the means available to a state.²⁶⁸ However, no matter how limited those means, it is difficult to imagine a set of circumstances that could keep states from—on the basis of the active personality principle—prosecuting their citizen-investors who, for instance, pollute the water resources in a third country, or from adopting domestic legislation²⁶⁹ that prohibits such behavior regardless of where it takes place.²⁷⁰

CONCLUSION

Early on in this Article, it was suggested that the classic state-centric vision of international law can and should offer certain alternative solutions to the asymmetries that its legal order contains with regard to the disequilibrium in the attributes of the international legal personality of multinational corporations. The effective implementation by states of their due diligence obligations in the field of human rights protection, apart from protecting the victims of human rights abuses, will also be of

268. Although that legislation also cannot disproportionately violate rights of the investor.

269. See Institut de Droit Int'l, *supra* note 46, ¶ 6(a).

A State may impose reasonable regulations on a multinational enterprise whose parent company is established in that State with regard to the activity of its subsidiaries established in other States In applying such regulations a State should seek to avoid conflict with the law or regulations of the States in which the subsidiaries are established or the activities take place.

At the international level, there is nothing to prohibit states from including human rights provisions in their BITs. For example, the draft model of BIT proposed by Norway which provides for the encouragement of “investors to conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises and to participate in the United Nations Global Compact.” Draft Model Norwegian Bilateral Investment Treaty art. 32, Dec. 19, 2007, *available at* <http://www.asil.org/>. However, one has to admit that the complex corporate structures of multinational corporations with the attendant overlap between multiple domestic legal orders and the difficulties in the determination of their nationality, render it more difficult to define the state which is entitled (or, according to the argument advanced by this Article, even obliged) to exercise control over a company and regulate its activities. Furthermore, as noted by Steven Ratner,

[m]any of the largest TNEs have headquarters in one state, shareholders in others, and operations worldwide. If the host state fails to regulate the acts of the company, other states, including the state of the corporation's nationality, may well choose to abstain from regulation based on the extraterritorial nature of the acts at issue.

Ratner, *supra* note 5, at 463. In accordance with this argument, the role of the home state cannot be but complementary to that of the host state.

270. See, e.g., Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 271, 292–293 (2009).

substantive aid in the process of crystallization of the *corpus juris* regulating both the primary and secondary obligations of investors in the field of human rights. However, even after the framework of the international obligations of corporations reaches a level of normative and practical maturity, the state's role will continue to be central in its effective implementation.

This Article suggests that until the international legal order reaches that point of maturity, the existing *lacunae* may be filled by emphasizing the affirmative obligations that states have under the due diligence principle. Although priority is given to the state exercising territorial authority, states that are directly linked to a given situation (through nationality, for instance) are equally obligated to make a positive contribution to prevention and sanctioning of an international wrong. In fact, the latter state's international obligations to demonstrate diligence are parallel and complementary to those of the state exercising territorial jurisdiction. The criterion here is the equilibrium that must be maintained between state sovereignty and effectiveness in human rights protection. Accordingly, where the host state (possessing the territorial link) is found to be in a situation of impossibility or unwillingness to adopt the necessary positive measures, it is for the state of origin (which possesses the nationality link) to exercise subsidiary diligence through the punishment of the human rights abuses of its investors. With respect to prevention, there is nothing that prevents both the home state and the host state from advancing parallel policies.

The need for such a pro-active approach is self-evident in light of today's international reality, in which powerful corporations develop their activities within the territory of less *puissant* states. In this game, the state of origin is far from neutral and the puzzle is further complicated by the quasi-silence of international law as to human rights obligations and the responsibility of corporations.

The "construction" proposed in this Article regarding the international obligations of the state of origin was developed on three levels. First, we must accept that states have a generic obligation to demonstrate diligence. Second, for the standard of diligence to take on a concrete shape, it must be "embodied" within the substantive international human rights obligations of states. And, finally, these human rights obligations must develop an extraterritorial effect on the basis of a nexus connecting one state's legal order with specific wrongful conduct. The cumulative confluence of these three conditions makes it not just possible but, in fact, obligatory for the state of origin to regulate and control the international activities of its investors. Accordingly, states enjoy discretion in punishing investors' human rights breaches on the basis of universal jurisdic-

tion, while the “home” state bears a positive international obligation via active personality jurisdiction to both regulate and punish its own investors who abuse human rights abroad. Any failure to do so results in international responsibility on the part of that state.

Nonetheless, this construct of obligations does have specific limitations that stem from each level of the proposed structure and interact cumulatively. For one, due diligence only introduces an obligation of means. Moreover, leaving aside the handful of human rights norms that enjoy the *jus cogens* normative supremacy, the rest of the nonabsolute fundamental rights are susceptible to legitimate limitations. Additionally, proportionality is the instrument that enables the maintenance of a fair balance between the protection of dignity-stemming values of humanity on the one hand, and the libertarian margin of discretion for governments to regulate their markets and decide on priorities with regard to investment or, more broadly, to economic policy, on the other hand.

